

***United States Court of Appeals
for the Second Circuit***



APPENDIX

Docket No. 74-2259

(126-E)

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Page 5

IN THE
United States Court of Appeals
For the Second Circuit

CAMILLUS WEST HOMEOWNER'S ASS'N., INC.,
Individually and on behalf of all those entitled to the use and
enjoyment of the environment and natural resources of the
Town of Camillus, New York, and all others similarly situated,
Plaintiffs-Respondents,

—vs—

CLAUDE E. BRINEGAR, Individually and as Secretary of
Transportation of the United States,

Defendant,

and

RAYMOND T. SCHULER, Individually and as
Commissioner of the Department of Transportation, State of
New York,

Defendant-Appellant.

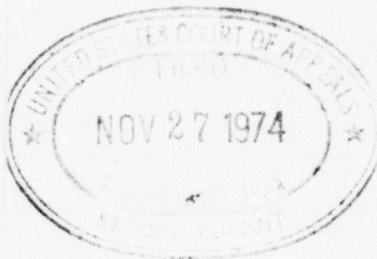
JOINT APPENDIX

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**COMPLAINT FOR INJUNCTION AND
DECLARATORY JUDGMENT.**

UNITED STATES DISTRICT COURT
for the
NORTHERN DISTRICT OF NEW YORK

CAMILLUS WEST HOMEOWNER'S ASSN INC. ,
Individually and on behalf of all those
entitled to the use and enjoyment of the
environment and natural resources of the
Town of Camillus, New York, and all
others similarly situated

Plaintiffs

-against-

CLAUDE E. BRINEGAR, Individually and
as Secretary of Transportation of the
United States and
RAYMOND T. SCHULER, Individually and
as Commissioner of the Department of
Transportation, State of New York

Defendants

CIVIL ACTION NO. 73-CV-481

**COMPLAINT FOR INJUNCTION AND DECLARATORY
JUDGMENT**

The Plaintiff individually and on behalf of all those
entitled to the use and enjoyment of the environment
and natural resources of the Town of Camillus, New
York, and all others similarly situated sets forth
and alleges:

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Proposed Federal Actions Effecting the Environment",
36 Fed Register 7724.

8. This action also arises under Title 49, United States Code Section 1653 "Responsibilities of the Secretary of Transportation".

9. This action also arises under Title 23, United States Code, Section 109 and Section 128.

10. This action also arises under regulations promulgated by the Department of Transportation as Title 23 of the Code of Federal Regulations, Part 1 as amended.

11. This action also arises under regulations promulgated by the Department of Transportation in 1972 and known as Policy and Procedure Memorandum 90-1 "Environmental Impact and Related Statements".

CLASS ACTION

12. This action is brought by the Plaintiff, individually and on behalf of all those entitled to the use and enjoyment of the environment and natural resources of the Town of Camillus, New York, and all others similarly situated.

The members of this class are so numerous as to make it impracticable to bring them all before this Court. There are substantial questions of law and fact common to the class and common relief on behalf of all members of this class is sought.

The claims of the representative are typical of the claim of the members of the class and the Defendant's actions have substantial effect upon all members of the class and thereby make appropriate final injunctive and corresponding declaratory relief with respect to the class as a whole as a proper class action under Rule 23 B-2 Federal Rules of Civil Procedure.

The prosecution of separate action by individual

Complaint for Injunction and Declaratory Judgment.

members of the class would create the risk of inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the Defendants, so that this action is a proper class action under Rule 23 B-1a Federal Rules of Civil Procedure.

Adjudication with respect to individual members of the class would, as a practical matter, be dispositive of the interests of the other members of the class not party to this litigation so that this action is a proper class action under Rule 23-B 1b Federal Rules of Civil Procedure.

The members of the class are fairly and adequately represented by this Plaintiff and this Plaintiff has no interest adverse to that of any individual who might be entitled to the relief sought herein.

DECLARATORY JUDGMENT

13. This is a proceeding for a judgment declaring the rights and legal relations of the parties to the matter in controversy under Title 28, United States Code. Sections 2201 and 2202.

ACTION FOR AN INJUNCTION

14. This is an action for an injunction under Rule 65, Federal Rules of Civil Procedure and Title 5, United States Code, Section 705.

FOR A FIRST CAUSE OF ACTION

15. Title 49, United States Code, Section 1653 B-1 states in pertinent part

"In carrying out his duties and responsibilities under this chapter, the Secretary shall be governed by all applicable statutes including the policy standards set forth in the Federal Aviation Act of 1958, as amended; the national transportation

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policy of the Interstate Commerce Act, as amended; Title 23, relating to Federal-aid highways;"

16. Title 23, United States Code, Section 128, part of the Federal-Aid to Highways Act states

"(A) any state highway department which submits plans for a federal-aid highway project involving the by-passing of or going through any city, town or village, either incorporated or unincorporated, shall certify to the Secretary that it has had public hearings or afforded the opportunity for such hearings and has considered the economic and social effects of such a location, its impact on the environment and its consistency with the goals and objectives of such urban planning as had been promulgated by the community. Any state highway department which submits plans for an interstate system project shall certify to the Secretary that it has had public hearings at a convenient location or has afforded the opportunity for such hearings for the purpose of enabling persons in rural areas through or contiguous to the property the highway will pass to express any objections they may have to the proposed location of such highway. Such certification shall be accompanied by a report which indicates the consideration given to the economic, social, environmental and other effects of the plan, highway, location or design and various alternatives which were raised during the hearing or which were otherwise considered."

17. Title 23 of the Code of Federal Regulations, Part 1, as amended, entitled 'Highways - Administration of Federal Aid for Highways - Public Hearings and Design Approval' reported at Volume 34, Federal Register, Page 727 and following, states in pertinent part

Complaint for Injunction and Declaratory Judgment.

"1. Purpose. The purpose of this Policy and Procedure Memorandum is to insure to the maximum extent practicable, that highway locations and designs reflect and are consistent with Federal, State, and local goals and objectives. The rules, policies, and procedures established by this PPM are intended to afford full opportunities for effective public participation in the consideration of highway location and design proposals by highway departments before submission to the Federal Highway Administration for approval. They provide a medium for free and open discussion and are designed to encourage early and amicable resolution of controversial issues that may arise.

2. Authority. This PPM is issued under authority of the Federal Aid Highway Act, 23 U.S.C., 101 et seq., 128, 315 and 49 U.S.C., 1651 et seq.

3. Applicability. This PPM applies to all highway projects.

6. Hearing Requirements.

a. Both a corridor public hearing and a design public hearing must be held, or an opportunity afforded for those hearings, with respect to each Federal-Aid Highway project that:

- (1) is on a new location; or
- (2) would have a substantially different social, economic or environmental effect; or
- (3) would essentially change the layout of function of connecting roads or streets.

d. With respect to a project on which a hearing was held, or an opportunity for a hearing afforded, before the effective date of this PPM, the following requirements apply:

Complaint for Injunction and Declaratory Judgment.

(2) With respect to those projects which have not received design approval:

(a) if design approval is not requested within 3 years after the date of the hearing, or an opportunity for a hearing, compliance with the design hearing requirements is required.

(b) If design approval is requested within 3 years after the date of the hearing, or an opportunity for a hearing, compliance with the design hearing requirements is nevertheless required unless the division engineer finds that the hearing adequately dealt with design issues relating to major design features.

7. Opportunity for Public Hearings.

c. The opportunity for another public hearing shall be afforded in any case where proposed locations or designs are so changed from those presented in the notices specified above or at a public hearing as to have a substantially different social, economic, or environmental effect.

d. The opportunity for a public hearing shall be afforded in each case in which either the State highway department or the division engineer is in doubt as to whether a public hearing is required."

18. A hearing has never been held by the Defendants, State or Federal Department of Transportation in conformance with the requirements of 23 United States Code, Section 128, or Title 23 of the Code of Federal Regulations, Part 1 as quoted above.

19. A public hearing was possibly held in 1961. The hearing at that time did not meet the requirements of Title 23, Code of Federal Regulations as to the

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consideration of economic, social, and environmental impact.

20. Upon information and belief, this project did not receive final design approval until after the effective date of Title 23 Code of Federal Regulations, Part 1, (quoted above) which was January 18, 1969.

21. Therefore, under Title 23, Code of Federal Regulations, Section 6, as quoted above, a new hearing was required regardless of the hearing held in 1961.

22. Substantial and extremely controversial changes have been made in the major design features of the highway since the alleged hearing of 1961.

a. The bridging of Rolling Hills Road has been eliminated.

b. The length of the highway has been substantially extended and the design of the exit and entrance ramps at the end of the highway has been completely changed.

c. The location and design of New North Street has been entirely changed.

d. The location of the By-Pass as it crosses Nine Mile Creek has been substantially changed.

Tremendous changes have taken place in the character of the community since 1961, of which the following are only a part:

a) vast increase in population

b) vast increase in business

c) huge increase in traffic

23. Therefore, under the requirements of Title 23, Code of Federal Regulations, Section 7 C and D as quoted above, a new hearing was necessary regardless of the hearing held in 1961 because of the substantial

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changes made in the design. The changes in the design as noted above will have a substantially different social, economic, and environmental effect than the design of the original highway.

24. As a proper hearing has not been held in conformance with Federal law and regulations as quoted above, further construction of the highway should be enjoined until such time as a proper hearing is held.

25. The Plaintiffs individually and as a class will suffer irreparable injury if the highway is completed without a proper hearing being held and will be denied for all the time rights guaranteed to them under Federal Law.

AS A SECOND CAUSE OF ACTION

26. Title 42, United States Code, Section 4321 et seq, known as the National Environmental Policy Act, states in pertinent part

"4321 - Congressional Declaration of Purpose.

The purpose of this Chapter - to declare a national policy which will encourage productive and enjoyable harmony between man and his environment; To prevent efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; To enrich the understanding of the ecological systems and natural resources important to the nation; and to establish counsel on environmental quality.

4331 - Congressional Declaration of National Environmental Policy.

b. In order to carry out the policy set forth in this chapter, it is the continuing responsibility of the Federal Government to use all practicable means consistent with other essential considerations of national policy; to improve and coordinate Federal

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plans, function programs, and resources to the end that the nation may

1. fulfill the responsibilities of each generation as trustee of the environment for succeeding generations
 2. assure for all Americans safe, healthful, productive, and aesthetically and culturally pleasing surroundings
 3. attain the widest range of beneficial uses of the environment without degradation, risk their health or safety, or other undesirable or unintended consequences
 4. preserve other important historic and cultural and natural aspects of our natural heritage and maintain wherever possible an environment which supports diversity and variety of individual choice
 5. achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities
 6. enhance the quality of renewable resources and approach the maximum obtainable recycling of depletable resources
- c. the Congress recognizes that each person should enjoy a healthful environment and that each person has a responsibility to contribute the preservation and enhancement of the environment

4332 - The Congress authorizes and directs that to the fullest extent possible

1. The policies, regulations and public laws of the United States shall be interpreted and administered in accordance with the policies as set forth in this chapter and

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2. all agencies of the Federal Government shall
 - c. include in every recommendation or report on proposals for legislation and other major federal action significantly affecting the quality of the human environment, a detailed statement by the responsible official on
 - i. the environmental impact of the proposed action
 - ii. any adverse environmental effects which cannot be avoided should the proposal be implemented
 - iii. alternatives to the proposed action
 - iv. the relationship between local short term uses of man's environment and the maintenance and enhancement of long term productivity and
 - v. any irreversible and any irretrievable commitments of resources which would be involved in the proposed action should it be implemented"

27. Executive Order No. 11514 of March 5, 1970 reported as 35 FR 4247 states in pertinent part

"By virtue of the authority vested in me as President of the United States and in furtherance of the purpose and policy of the National Environmental Policy Act of 1969, it is ordered as follows:

Section 1 - The Federal Government shall provide leadership in protecting and enhancing the quality of the nation's environment to sustain and enrich human life

Section 2 - Consonant with Title 1 of the National Environmental Act of 1969, the heads of Federal agencies shall

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- a. monitor, evaluate and control on a continuing basis that agencies activities so as to protect an enhance the quality of the environment.
- b. develop procedures to insure the fullest practicable provision of timely public information and understanding of Federal plans and programs with the environmental impact in order to obtain the views of interested parties. These procedures shall include, whenever appropriate, provision for public hearings and shall provide the public with relevant information including information on alternative courses of action."

28. The Council on Environmental Quality has promulgated regulations entitled "Statements on Proposed Federal Actions Effecting the Environment Guidelines" which states in pertinent part

1. "Purpose. This memorandum provides guidelines to Federal Departments, agencies and establishments for preparing detailed environmental statements on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment as required by Section 102 2 C of the National Environmental Policy Act hereinafter the "Act" underlying the preparation of such environmental statements is the mandate of both the Act and Executive Order 11514 of March 4, 1970, that all Federal agencies to their fullest extent possible, direct their plans, policies and programs so as to meet national environmental goals. The objective of Section 102 2 C of the Act and of these guidelines is to build into the agency decision making process an appropriate and careful consideration of the environmental aspects of the proposed action and to assist agencies implementing, not only the letter, but the spirit of the Act.

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2. Policy. As early as possible, and in all cases, prior to agency decision concerning major action and/or recommendations or a favorable report on legislation that significantly affects the environment, Federal agencies will, in consultation with other appropriate Federal, State or local agencies assess and detail the potential environmental impact in order that adverse effects are avoided and environmental quality is restored or enhanced to the fullest extent practicable. In particular, alternative actions that will minimize adverse impact should be explored and both the long and short range implications to man, his physical and social surroundings, and to nature, should be evaluated and in order to avoid the fullest extent practicable, undesirable consequences for the environment.

11. Application of Section 102 2 C Procedure to Existing Projects and Programs. To the maximum extent practicable the Section 102 2C Procedure should be applied to further major Federal actions having significant effect on the environment even though they arose from projects or programs initiated prior to enactment of the Act on January 1, 1970. Where it is not practicable to reassess the basic course of action, it is still important that further incremental actions be shaped so as to minimize adverse environmental consequences. It is also important in further actions that account be taken of environmental consequences not fully evaluated at the outset of the project or program."

29. The United States Department of Transportation has promulgated regulations concerning the preparation of environmental impact statements. In a memorandum entitled "Policy and Procedure Memorandum 90-1" as amended Section 6 P states in pertinent part

"The HA shall include reference to the previous environmental statement, negative declaration, or

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reassessment when requesting design approval, authorization for right-of-way acquisition, approval of PS and E and construction authorization.

1. A new environmental statement or a supplemental statement will be necessary before a highway section when the proposal being processed introduces a new or changed environmental effect of significance to the quality of the environment. The FHWA may also request a environmental statement for a highway section which received design approval before February 1, 1971 when in its judgment, changes in the highway subsequent to the reassessment introduce significantly different impacts on the environment."
30. Construction of a highway with Federal funds is a major Federal action.
31. Construction of this highway will have significant effects upon the quality of the human environment.
32. No environmental impact statement has even been prepared for this project.
33. The National Environmental Policy Act applies to projects begun before the effective date of the Act.
34. In any event, since January 1, 1970, the effective date of the National Environmental Policy Act, significant and major Federal actions have taken place, requiring a new impact statement, of which the following actions are only a part:
 - a) major design changes have taken place, of major environmental significance
 - b) estimate of cost took place
 - c) fund authorization took place
 - d) authorization to receive bids for construction took place

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e) authorization for construction to begin took place

35. United States Department of Transportation
Policy and Procedure Memorandum 90-1 appendix f,
states in pertinent part

"Evaluating Highway Section Environmental Effects.

1. Draft and final environmental statements should be prepared and processed in accordance with procedures required by this memorandum for all highway sections falling under one or more of the following three categories:

- a. highway sections where organized opposition has occurred or is anticipated to occur
- b. highway section significantly affecting historic or conservation lands independent of whether they are Section 4f cases
- c. highway section which are classed as major actions and are also likely to significantly affect the quality of the human environment

2. The following should be used to determine whether a proposal to construct or improve a highway section is a major action

- a. highway sections entirely are generally on a new location
- b. major upgrading of an existing highway section resulting in a functional characteristic change. For example a local road becoming an arterial highway. Such changes usually result by adding lanes, interchanges, access control, medians, etc. and require extensive right-of-way acquisition and construction (grading, base paving, bridges, etc.) which have the potential of significantly affecting human environment.

3. Any of the following highway sections should

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ordinarily be considered as significantly affecting the quality of the human environment.

- a. a highway section that is likely to have a significant adverse impact on natural ecological, cultural or scenic resources of national, state or local significance
- b. a highway section that is likely to be highly controversial regarding relocation housing resources
- c. a highway section that divides or disrupts an established community or disrupts orderly planned development or is inconsistent with plans or goals that have been adopted by the community in which the project is located; or causes increased congestion
- d. a highway section which involves inconsistency with any national, state, or local standards relating to the environment has a significantly detrimental impact on air or water quality, or on ambient noise levels for adjoining areas involves a possibility of contamination of a public water supply system or affects ground water, flooding, erosion, or sedimentation

36. The construction of this highway has been extremely controversial and has created organized opposition continuously since 1960.

37. Construction of this highway will seriously disrupt the established community of Camillus, and will disrupt orderly, planned development of the Town and Village of Camillus.

38. Construction of the highway as planned will produce results and conditions inconsistent with National, State and local standards relating to the environment of which the following are only a part:

- 1. a deleterious effect upon the condition of ground water

Complaint for Injunction and Declaratory Judgment.

2. an increase in the possibility of flooding
 3. pollution of Nine Mile Creek
 4. increase in erosion of banks of Nine Mile Creek
39. In the light of the above quoted statutes and regulations and environmental impact statement was an absolute prerequisite to construction of this highway. Construction without the preparation of such a statement is in clear violation of law.
40. The Plaintiffs both individually and as a class, will suffer irreparable injury as a result of the actions of the Defendants, Department of Transportation.
41. If construction of the highway is allowed to continue, the remedies afforded by law and by the constitution to the Plaintiffs from the unlawful actions of the Defendants will be destroyed and the Plaintiffs will be left without any remedy.

AS A THIRD CAUSE OF ACTION

42. Title 23, United States Code, Section 109 states in pertinent part

"109 - Standards.

a. Their Secretary shall not approve plans and specifications for proposed projects on any Federal-Aid system. If they fail to provide for a facility

1. That will adequately meet the existing and probable future traffic needs and conditions in a manner conducive to safety, durability and economy of maintenance
2. That will be designed and constructed in accordance with standards best suited to accomplish the foregoing objectives and to conform to the particular needs of each locality

Complaint for Injunction and Declaratory Judgment.

h. Not later than July 1, 1972, their Secretary after consultation with appropriate Federal and State officials shall submit to Congress, and not later than ninety days after such submission, promulgate guidelines designed to assure that possible adverse economic, social environmental effects related to any proposed project on any Federal-Aid system have been fully considered in developing such project, and that the final decision on that project are made in the best overall public interest taking into a consideration the need for fast, safe and efficient transportation, public services and the cost of eliminating or minimizing such adverse effects and the following:

1. aid, noise and water pollution
2. destruction or disruption of man-made and natural resources, aesthetic values, community cohesion and the availability of public facilities and services
3. adverse employment effects and tax and property value losses
4. injurious displacement of people, business and farms
5. disruption of desirable community and regional growth

Such guidelines shall apply to all proposed projects with respect to which plans specifications and estimates are approved by the Secretary after the issuance of such guidelines."

43. The decision of the Secretary of the Department of Transportation to approve plans, specifications, estimates and construction for this highway was arbitrary and capricious, unsupported by evidence and an abuse of discretion both as to Section a above and as to Section h above. As to Title 23, United States Code, Section 109 a above, the design of the exit system at the end of the

Complaint for Injunction and Declaratory Judgment.

By-Pass will not adequately meet the needs of present or probable future traffic in the manner conducive to safety. The proposed exit system will result in extremely hazardous conditions and will threaten the safety of the students attending the Camillus Junior High School.

As to Title 23, United States Code, Section 109 h above, the proposed highway will create water pollution problems, destruction and disruption of both man-made and natural resources, aesthetic values and in particular, community cohesion and the availability of public facilities and services, will have an adverse effect on employment and on property values and will disrupt desirable community and regional growth.

Wherefore, Plaintiff prays that the Court enter its order restraining the Defendants and their agents from any and all further acts which will change the environment of the Town of Camillus, New York. And further, restraining the Defendants and their agents from any further condemnation, contracting, cleaning, and construction of the highway known as the Camillus By-Pass and more particularly known as New York PIN 3033.10, Federal-Aid Project F-U-446 (22), and

DIRECTING, the immediate hearing on the merits of the Plaintiff's application for a temporary injunction, and

ORDERING the Defendants to prepare an environmental impact statement in accord with Federal law and regulations and

ORDERING the Defendants to hold a public hearing pursuant to Title 23, United States Code, Section 128 and

REMANDING the proposed design of the highway to the Secretary for further consideration in light of the requirements of Title 23, United States Code, Section 109

Complaint for Injunction and Declaratory Judgment.

TOGETHER with such other and further relief as
to the Court shall seem just and proper under the
circumstances.

s/ RICHARD A. SCHECHTER
Richard A. Schechter, Esq.

URCIUOLI & COVINO
7145 Seventh North Road
Liverpool, New York 13088

(Verified October 20, 1973).

ANSWER OF DEFENDANT SCHULER.

(SAME TITLE).

Defendant Raymond T. Schuler, by his attorney, Louis J. Lefkowitz, Attorney General of the State of New York, answering the complaint herein:

1. Denies the allegations contained in paragraphs numbered "2", "6", "7", "9", "10", "11", "12", "18", "20", "21", "22", "23", "24", "25", "31", "33", "34", "36", "37", "38", "39", "40", "41" and "43" of the complaint.

2. Denies information sufficient to form a belief as to the allegation contained in paragraph numbered "8" of the complaint.

3. Admits all of paragraph numbered "3", except that part which reads, "The matter in controversy, exclusive of interests and costs, in the instant case, exceeds the value of \$10,000.00".

4. Denies all of paragraph numbered "19", except that part which reads, "A public hearing was. . . held in 1961".

FIRST DEFENSE

5. Plaintiff lacks standing to maintain the action.

SECOND DEFENSE

6. The Court lacks jurisdiction of the subject matter of the action.

THIRD DEFENSE

7. The Court lacks jurisdiction of the person of defendant Schuler.

FOURTH DEFENSE

8. The complaint fails to state a claim against defendant upon which relief can be granted.

Answer of Defendant Schuler.

FIFTH DEFENSE

9. The action is barred by laches.

WHEREFORE, defendant demands that the complaint herein be dismissed, together with the costs and disbursements of this action.

DATED: Albany, New York
December 28, 1973

Signed:

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Defendant Schuler
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Albany, New York 12224
BY s/ DOUGLAS S. DALES, JR.
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HONORABLE JAMES M. SULLIVAN, JR.
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Syracuse, New York 13201

ANSWER OF DEFENDANT BRINEGAR.

(SAME TITLE).

The defendant Claude E. Brinegar, by his attorney, James M. Sullivan, Jr., United States Attorney for the Northern District of New York, for his answer to the complaint herein:

1. Denies the truth of the allegations contained in paragraphs 2, 3, 6, 7, 8, 9, 10, 11, 18, 19, 20, 21, 23, 24, 25, 31, 36, 37, 38, 39, 40, 41, and 43.

2. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 1, 4, 5, 12, 13 and 14.

3. Admits that the bridging of Rolling Hills Road has been eliminated, but otherwise denies the truth of the allegations contained in paragraph 22.

4. Admits that the National Environmental Policy Act applies to certain "ongoing" projects begun before the effective date of the Act, but otherwise denies the truth of the allegation contained in paragraph 33.

5. Admits that since January 1, 1970, the actions alleged in paragraph 34(b), (c), (d), and (e) did occur, but otherwise denies the truth of the allegations contained in paragraph 34.

AFFIRMATIVE DEFENSES

As and for affirmative defenses, the defendant Claude E. Brinegar alleges:

6. The plaintiff lacks standing to maintain this action.

7. The action is barred by laches.

8. The court lacks jurisdiction of the subject matter of the action.

9. The complaint fails to state a claim upon which relief can be granted.

Answer of Defendant Brinegar.

WHEREFORE, defendant Claude E. Brinegar demands that the complaint herein be dismissed, together with the costs and disbursements of this action.

Dated: Syracuse, New York
January 22, 1974.

JAMES M. SULLIVAN, JR.
United States Attorney
Northern District of New York

By s/ GEORGE H. LOWE
Assistant U.S. Attorney
Federal Building
Syracuse, N.Y. 13201

NOTICE OF MOTION.

(SAME TITLE).

NOTICE OF MOTION
to
UNITED STATES DISTRICT COURT
for the
NORTHERN DISTRICT OF NEW YORK

PLEASE TAKE NOTICE that the Plaintiffs will move this Court at the United States District Courthouse, Syracuse, New York, on the 14th day of January, 1974 at 10:00 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, upon the Motion, Complaint, Memorandum of Law, and Affidavit, previously submitted in this action, and upon this Motion for an ORDER:

ENJOINING Defendants from any and all acts which will change the environment of the region of the Village and Town of Camillus, New York and,

ENJOINING the Defendants from expending any Federal funds in furtherance of construction of the Camillus By-Pass, more particularly known as New York PIN 3033.10, Federal Aid Project F-U-446 (22), including but not limited to actual construction, condemnation, contract letting and site clearance and,

ENJOINING Defendants from any and all acts in furtherance of construction of the Camillus By-Pass, more particularly known as New York PIN 3033.10, Federal Aid Project F-U-446 (22), including but not limited to actual construction, condemnation, contract letting and site clearance and,

DIRECTING, the immediate hearing on the merits of the Plaintiff's application for declaratory and injunctive relief, together with such other and further relief as the Court shall seem just and proper under the circumstances.

Affidavit of Willard H. Ketchum in Opposition to Motion
for Preliminary Injunction.

URCIUOLI & COVINO

By: s/ RICHARD A. SCHECHTER
Richard A. Schechter, Esq.
Attorney for the Plaintiffs
7145 Seventh North Road
Liverpool, New York 13088

Dated: January 4, 1974

**AFFIDAVIT OF WILLARD H. KETCHUM IN OPPO-
SITION TO MOTION FOR PRELIMINARY INJUNC-
TION.**

(SAME TITLE).

STATE OF NEW YORK)
)ss:
COUNTY OF ONONDAGA)

WILLARD H. KETCHUM, being duly sworn, deposes
and says:

I am Regional Design Engineer, Region 3, New York
State Department of Transportation. I make this affidavit
in opposition to plaintiff's motion for a preliminary
injunction. I am fully familiar with the facts and cir-
cumstances surrounding this litigation.

The suit is brought as a class action. It seeks to
enjoin the project known as the Camillus By-Pass (PIN
3033.10) upon the grounds 1) that no environmental
impact statement (EIS) was prepared, and 2) that an
additional public hearing is required due to alleged design
changes, in particular the elimination of the bridging of
Rolling Hills Road (Ed Dixon Road).

The project is officially designated FARC 73-121;
FASS 73-5; Camillus-Fairmount (II), Onondaga County-

Affidavit of Willard H. Ketchum in Opposition to Motion
for Preliminary Injunction.

PIN 3033.10.322, 3 & 4. The first public hearing in connection therewith was held in 1957. A second was held in December 1961 and January 1962. Opportunity for a third public hearing was advertised in June 1962, though no requests were received. A more thorough chronology of the project's progression from 1956 to the present is contained in the affidavit of John G. Bestgen, Division Engineer, New York Division, FHWA.

The gist of the complaint involves the elimination of a bridge at Rolling Hills Road, included in the preliminary plans presented at the public hearing on December 22, 1961 and January 9, 1962, later deleted in July 1966. The deletion was made due to the high cost, the undesirable grade that the bridging would have produced and the small amount of traffic using the road. A service road connecting Rolling Hills Road and New North Street was planned instead. The service road would provide more satisfactory access to the area and result in more reasonable grades.

It is submitted that the instant motion should be denied on at least four grounds.

First, as noted, the litigation is brought as a class action by a corporate plaintiff. Nowhere in the complaint, however, is there any allegation of the nature of the alleged injury or in what manner the plaintiff or the members which it purports to represent will be harmed. It is, thus, not possible to ascertain the nature and size of the class and whether the interests of the alleged class are, in fact, represented by this plaintiff.

Second, design approval was granted by BPR on December 5, 1961, and reconfirmed on September 26, 1969. Since design approval had been granted prior to January 14, 1969, the effective date of new PPM 20-8, FHWA determined that no additional hearings were required.

Affidavit of Willard H. Ketchum in Opposition to Motion
for Preliminary Injunction.

Third, there would be substantial prejudice to the State by the granting of an injunction. The State has progressed this project over a period of several years, obtaining FHWA approval at each stage of development, as documented in the affidavit of John G. Bestgen. Relying on such approvals, the State has expended substantial sums of money in preliminary design, right of way acquisition and construction. Attached hereto and made a part hereof as Appendix "A" is an estimate of the cost to the State to restart the project if suspended, the cost to the State if canceled and relet and the cost to the State of abandonment of the project. As appears therein, these costs are substantial. No corresponding prejudice has been demonstrated by plaintiff.

Lastly, the plaintiff association was on notice at least as early as August 16, 1973 of the procedures followed by the State as required by FHWA with respect to submitting an environmental reevaluation for the project, rather than an environmental impact statement. Attached hereto and made a part hereof as Appendix "B" are copies of letters dated August 17, 1973 and September 5, 1973, addressed to Raymond Sachs, and a copy of a letter dated September 13, 1973, addressed to Mayor Morris Raichlin of Camillus detailing the procedure. Attached hereto and made a part hereof as Appendix "C" is a newspaper article dated August 29, 1973 setting forth the same information. The instant litigation was not commenced until October 26, 1973, over two months later. During that period, the contract was approved by the Comptroller and construction began. Clearly, there has been an undue delay amounting to laches.

WHEREFORE, it is respectfully requested that the preliminary injunction be denied in its entirety. Should the Court grant injunctive relief, it is requested that security be required.

s/ WILLARD H. KETCHUM

(Sworn to February 7, 1974).

**Appendix A — Estimate of Cost to Restart Project if Suspended
attached to Ketchum Affidavit.**

I. Cost to restart if suspended

a) Excavation of materials

\$4-1/2 million in contract

1 million mfg. to date

\$3-1/2 million X 1%/mo.

\$35,000/mo.

b) Overhead - fixed project &
general office

35,000/mo.

c) Escalation of labor

\$7,000,000 in contract

\$400,000 per average working month

10% (Each mo. beyond 4/1/74)

X 400,000

40,000/mo.

d) Equipment (operation & maintenance)
(including idle time)

110,000/mo.

Total/mo. of suspension

220,000/mo.

e) Impact cost (fencing, safety, reseeding,
remobilization & subcontractor
charges)

50,000 Lump Sum

Summary - \$50,000 fixed sum + \$200,000/mo. for
each additional month beyond 4/1/74.

Appendix A — Estimate of Cost to Restart Project if
Suspended attached to Ketchum Affidavit.

II. Dollars Lost If Canceled & Relet

a) Items completed under existing contract
to be duplicated in future contract

1. Mobilization (3% of existing)	\$450,000	
2. Maintenance & Protection of Traffic (2 x \$30,000)	60,000	
3. Surveying (50% x \$394,000)	197,000	
4. Soil Lab buildings (2 each - 100% existing)	2,600	
5. Engineer's Office (50% of existing)	10,000	
	<u>\$719,600</u>	= \$720,000 ± 50,000
b) Site Restoration		

c) Cost Escalation (15%/yr.)	
10% of existing contract committed -	
15,500,000 ± - 1,500,000 ± = \$14,000,000	
balance - \$14,000,000 x 15%	\$2,100,000

Summary - \$770,000 Lump Sum + \$2,100,000/year

Appendix A — Estimate of Cost to Restart Project if
Suspended attached to Ketchum Affidavit.

III. Per Cent Cost Breakdown

% State - 50%

% Federal - 50%

IV. Cost to Abandon Expressway

a) Preliminary Engineering Cost		\$ 902,000
b) R.O.W. Cost		\$3,225,000
c) Utility Relocation Cost		
(1) Niagara Mohawk Gas		
& Electric	100,000	
(2) New York Telephone	100,000	
(3) Onondaga County Water		
Authority	<u>30,000</u>	
d) Building Demolition Costs		\$ 230,000
2 Previous Contracts		\$ 75,000
e) Completed Contract Work Cost		\$ 303,000
f) Shutdown Costs		
Refer to I (b & c)	\$768,000	
" " III (e)	50,000	
" " IV (a)	<u>720,000</u>	
		<u>\$1,538,000</u>
Cost to Abandon Summary		\$6,273,000

**Appendix B — Letters, dated 8-17-73, 9-5-73 addressed to
Raymond Sachs and Letter, dated 9-13-73 to Mayor Morris
Raichlin attached to Ketchum Affidavit.**

16 Russell Road
Albany, New York 12206

August 17, 1973

01-30.4C

Mr. Raymond Sachs
P.O. Box 125
Camillus, New York 13031

Dear Mr. Sachs:

This letter is to confirm and supplement the information given to you by Mr. Davino of this office during a telephone conversation on August 16, 1973.

On June 19, 1973 this office authorized the New York State Department of Transportation to advertise for the receipt of bids on federal project F-U- 446(22), which covers New York PIN 3033.10.

This project provides for construction of a portion of relocated State Route 5 from State Route 173 in Fairmount to a point on existing Route 5 approximately 0.5 mile west of Maple Drive in Camillus.

This project is discussed in an environmental reassessment approved by this office on May 26, 1971. The environmental reassessment is the document upon which the Federal Highway Administration (FHWA) made the determination that an Environmental Impact Statement is not required for this project. A complete statement of FHWA policies and procedures to comply with the National Environmental Policy Act is contained in PPM 90-1, a copy of which is enclosed. Reassessments are discussed in paragraphs 5(b) and (c) on page 3.

If we can be of further service to you, please do not hesitate to contact us.

Appendix B — Letters, dated 8-17-73, 9-5-73, addressed
to Raymond Sachs and Letter, dated 9-13-73 to Mayor
Morris Raichlin attached to Ketchum Affidavit.

Sincerely yours,

/s/ JOHN G. BESTGEN

John G. Bestgen

Division Engineer

Enclosure

cc:

File - Proj.

Reading File

Dist. C

Mr. Hausler

RA Davino: dlv: 08-17-73

Appendix B — Letters, dated 8-17-73, 9-5-73, addressed to Raymond Sachs and Letter, dated 9-13-73 to Mayor Morris Raichlin attached to Ketchum Affidavit.

16 Russell Road
Albany, New York 12206

September 5, 1973

01-30.4C

Mr. Raymond Sachs
P. O. Box 125
Camillus, New York 13031

Dear Mr. Sachs:

Thank you for your letter dated August 27, 1973, regarding New York PIN 3033.10 (Federal-aid Project F-U-446(22)).

Your letter suggests that our actions in regard to approving an environmental reassessment did not meet the appropriate guidelines, and cites several sections of PPM 90-1

We wish to point out that all of the sections of PPM 90-1 which you cite in your letter pertain to procedures to be followed when preparing and processing environmental impact statements (or negative declarations) only. Note in particular that section 5(b) refers only to sections 2 and 3 of Appendix F.

The portions of the PPM which pertain to "reassessments" are paragraphs 5(b) and (c) on page 3. Note that environmental reassessments are only required for projects which received design approval on or after January 1, 1970 and before February 1, 1971. Projects for which designs were approved on or after February 1, 1971 require either an environmental impact statement or a negative declaration, and projects which received design approval prior to January 1, 1970 require no special environmental report.

New York PIN 3033.10 received design approval on December 5, 1961. That approval was reconfirmed by the Federal Highway Administration on September 26, 1969.

Appendix B — Letters, dated 8-17-73, 9-5-73, addressed to Raymond Sachs and Letter, dated 9-13-73 to Mayor Morris Raichlin attached to Ketchum Affidavit.

Therefore, under presently approved procedures, no further environmental review or report would be necessary. However, prior to issuance of PPM 90-1 a decision had been made that an environmental reassessment would be desirable on several projects, one of which was PIN 3033.10.

The reassessment was progressed in accordance with interim guidelines similar to those which were subsequently included in PPM 90-1.

As indicated in our August 17, 1973 letter to you, this office approved the reassessment on May 26, 1971, thereby making a determination that the project should be allowed to proceed. Our actions were in accordance with the then current procedures which are compatible with paragraphs 5(b) and (c) of present PPM 90-1. Therefore, we do not consider it appropriate to defer further progress of this project.

If we can be of further service to you, please do not hesitate to contact us again.

Sincerely yours,

JOHN G. BESTGEN
John G. Bestgen
Division Engineer

cc:
Chief Engr. - NYSDOT (2)

Appendix B — Letters, dated 8-17-73, 9-5-73, addressed to Raymond Sachs and Letter, dated 9-13-73 to Mayor Morris Raichlin attached to Ketchum Affidavit.

16 Russell Road
Albany, New York 12206

September 13, 1973

Mr. Morris Raichlin
Mayor
Camillus, New York 13031

Dear Mr. Raichlin:

Thank you for your letter dated September 1, 1973 regarding the proposed reconstruction of Route 5 in Camillus. Your interest in the highway construction program is appreciated.

Review of background information for this project indicates that public hearings were held on December 22, 1961 and January 9, 1962 at which time officials and individuals were afforded an opportunity to comment.

In addition, numerous conferences, consultations, and exchanges of correspondence have occurred between interested parties including local officials and several State and local agencies since the hearings were held.

We believe that all suggestions and comments have been duly considered. Where feasible, changes were made in the proposed project to better serve the overall public need.

With regard to the treatment of several streets in or near the Village of Camillus, we wish to point out that although existing North Street will be terminated, a "relocated" North Street including a grade separation structure and partial interchange is included in the current project. We wish to point out also that one of the early proposals included a grade separation structure at Rolling Hills Road (Ed Dixon Road). As project development progressed, however, it became apparent that the high structural costs at this location could not be justified in view of the low traffic volume on Rolling

Appendix B — Letters, dated 8-17-73, 9-5-73, addressed to Raymond Sachs and Letter, dated 9-13-73 to Mayor Morris Raichlin attached to Ketchum Affidavit.

Hills Road. An alternate plan providing for a service road connecting Rolling Hills Road to North Street north of the Route 5 mainline was presented to officials of the Town of Camillus for comment in May 1966, and subsequently endorsed by them. Construction of this service road is included in the current contract.

The development of this project to date has been accomplished in accordance with appropriate Federal Regulations (including public hearing requirements). We therefore, have no basis for delaying further progress at this time.

Should you wish to obtain detailed information, we urge you to contact:

Mr. Joseph Powers, Regional Director
New York State Department of Transportation
333 East Washington Street
Syracuse, New York 13202

Details of the progression of this project are summarized in the "Environmental Policy Re-Evaluation" dated April 16, 1971, a copy of which is available for review at this office.

If we can be of further service to you, please do not hesitate to contact us again.

Sincerely yours,

s/ J.G. BESTGEN

For: John G. Bestgen
Division Engineer

cc:

Chief Engineer - NYSDOT (2)

**Appendix C — Newspaper Article, dated 8-29-73
attached to Ketchum Affidavit.**

SYRACUSE POST-STANDARD, Aug. 29, 1973

Opposed by Camillus Homeowners **Rt. 5 Bypass Under Fire**

By JAMES WOOLSEY

A residents' group in Camillus last night blasted the latest proposal for the Route 5 Bypass.

Members of the Camillus Westhill Homeowners' Association criticized the planned dead-ending of three roads, the effect of the bypass on the drainage pattern and the lack of communication between residents and officials responsible for the project.

About 20 persons were present at the meeting called by the association, including the Village Board and Frank Fatti of Camperlino & Fatti Builders Inc., which proposes to develop 500 acres north of Maple Drive.

Raymond Sachs, treasurer of the homeowners' association, presented most of the criticisms. The first traffic-related result of the bypass he mentioned was the proposed westward extension of Maple Drive and its connection with Ike Dixon Road.

This intersection would occur 100 feet from the Ike Dixon-Route 5 intersection, he said, and "less than half a dozen cars on either road will block the other."

Among the users of Ike Dixon Road, Sachs noted, will be the junior high school and those in the Camperlino & Fatti development.

Sachs presented a map showing the dead-ending of

North Street, Rolling Hills Road and Maple Drive. Particular attention was given to Maple Drive, blocked on either side of the new expressway.

Sachs said the fire apparatus would have to travel west on Route 5 then double back along Maple Drive to combat a blaze "the least bit" west of the new expressway.

"When you, as a layman, see what appears to be a very glaring error like this within five or 10 minutes of looking at the plans, you tend to have very serious doubts about the project," Sachs said.

Another item scored by the homeowners was that the expressway will cut across the drainage pattern of the hills to the north, thereby increasing the amount of water brought down to Rolling Hills Road.

No statement of the project's impact had been taken,

as required for federally funded projects, Sachs said. Instead, the Federal Highway Administration had accepted a reassessment.

The treasurer brought to the audience's attention a book of regulations issued by the highway administration which said an impact statement must be taken if there is actual or anticipated opposition.

Sachs pointed to the "tremendous outcry" raised by area residents when public hearings on the Route 5 bypass were held in 1960 and 1961.

This in turn led to allegations by Mrs. Carol Law, homeowners' association president, that the public had been kept in the dark as changes in the project were made.

"To be uninformed is to be in ignorance, and none of us likes to stand in ignorance," Mrs. Law said. "This has been forced on us by the state, and I think it was deliberate."

An executive statement listing these objections was adopted. Sachs said copies of the statement will be sent to the State Department of Transportation and the Federal Highway Administration.

Prior to adjournment, Mrs. Law said the homeowners' association at its regular meeting would form a committee to work with the Town Planning Board to evolve a master plan.

"The only way we can have any control is if we make up a master plan of what we want to do," said Millard Ames, Town Planning Board member and a resident of the area in question.

THE STATE OF NEW YORK)
COUNTY OF ALBANY) ss.
NORTHERN DISTRICT OF NEW YORK)

Johr G. Bestgen, being duly sworn, deposes and says:

2. As Division Engineer, I am responsible to the Regional Federal Highway Administrator, Region One for FHWA programs in the State of New York.

3. As Division Engineer, I interpret and apply policies and procedures currently in effect to the various functional areas of the highway program; namely, planning, research and development, design, right-of-way, construction and maintenance. Accomplishment of the work within the Federal-aid highway program is a cooperative effort of the FHWA and the New York DOT, jointly financed and supervised.

4. Through my position as Division Engineer, I have knowledge of the planning, design and construction of Route 5 on new location from Route 173 westerly to 0.8 mile west of the Village of Camillus on existing Route 5 just west of Maple Drive. The length of this construction is 4.90

Affidavit of John G. Bestgen.

miles which provides for 3.4 miles of six lane divided freeway and 1.5 miles of four lane divided freeway. This project is a replacement for existing Route 5 which now carries heavy through and local traffic causing congestion and delays within the limits of the project.

5. There is currently a combined Federal-aid construction project F-U-446(22) and S-SU-929(2) providing for the construction of the route described above. The NYSDOT contract numbers for these projects are FARC 73-121 and FASS 73-5. The S-SU-929(2) portion of this project (FASS 73-5) provides for construction of 1.14 miles of County Road 36 (Camillus-Warners Road or North Street) on new location from West Genesee Street to Newport Road as a two lane highway with current design standards.

6. Construction of these projects was authorized by FHWA to advertise for the receipt of bids and proceed with construction effective on June 19, 1973. Construction was started on September 27, 1973 and is scheduled for completion on October 29, 1973. (Exhibit I)

7. The project was originally developed by the NYSDPW (now NYSDOT) Region 3 Planning Office (then District 3 Office) as a location study in 1956. A copy of Mr. Ten Hagen's report on the location proposal (December 4, 1956) was sent to BPR (now FHWA) for information purposes. There is indication that the memorandum contained copies of a County Resolution apparently needed to secure State legislative approval of the proposed route. An official submission of the proposed route location was submitted to BPR on June 10, 1957 for approval. The submission was approved by BPR on June 13, 1957. (Exhibit II)

8. The State having obtained approval of location plans published a Notice of Highway Project Hearing in the Syracuse Herald Journal on September 27 and October 4, 1957. The Notice stated a hearing would be held on October 7, 1957 in accordance with the provisions of

Affidavit of John G. Bestgen.

Section 116(c) of the Federal-aid Highway Act of 1956. A Certificate of Public Hearing was submitted to BPR on February 21, 1958 with a copy of the hearing transcript. An "analysis of the hearing" was also submitted and points out the public reaction and participation at the hearing. Another summary of protests presented at the hearing was prepared by the BPR New York Division Office and it indicates another hearing was planned. (Exhibit III)

9. The State studied three alternate route locations subsequent to the 1957 Public Hearing and presented their analysis to BPR in a March 2, 1961 letter. The State's submission was reviewed by BPR and approved in a March 20, 1961 letter. Plans for a second public hearing were developed by NYSDPW in conjunction with BPR as evidenced by a Location Plan conference held on October 27, 1961. 1957 Public Hearing information was studied as part of the impact to the revised location plans. (Exhibit IV)

10. After the restudy by NYSDPW and review of revised Location Plan by BPR, another public hearing was scheduled and advertised for. The Notice of Highway Project Hearing was published in the Syracuse Herald Journal on December 11 and 12, 1961 under the provisions of Title 23, U.S.C. Section 128. (Exhibit V) The revised plan presented at this hearing was essentially the same as presented in the 1957 hearing insofar as the plans for the new Route 5 from North Street west to existing Route 5 are concerned. The major revision in the plans was the inclusion of a new spur connection from Fairmount to I-690. That I-690 - Route 5 connection is currently under construction as a separate contract.

11. The January 30, 1962 memorandum to files by the BPR Area Engineer summarizes the public reaction at the hearing. (Exhibit VI) Due to numerous complaints about the hearing being held so close to Christmas the

Affidavit of John G. Bestgen.

hearing was reconvened on January 9, 1962 as stated in the State's January 31, 1962 Certification in Accordance with Title 23 U.S.C. 128. BPR acknowledged receipt of the certificate and transcript and approved the hearing requirements on March 14, 1962. The March 14, 1962 approval was in accord with Paragraph 5.c of PPM 20-8(1) dated June 16, 1959. (Exhibit VII)

12. Correspondence subsequent to the March 14, 1962 approval indicates certain design changes were made in the approved plan based on the engineering findings in the development of detailed plans, consideration of property damage, economic considerations, input from State, County and Local governments, service to the travelling public and comments received at the previously discussed public hearings held for this project. A detailed listing of the correspondence documenting the changes and revisions is included in Section 2 of this narrative.

13. Specific approval actions for this project were requested by the NYSDPW in their submissions of December 12 and 19, 1963. These submissions transmitted a set of 1" - 50' preliminary plans and profiles with typical sections and pavement selection data for the entire project from Camillus to Syracuse. BPR approved the preliminary plans conditionally in a January 29, 1964 letter and fully approved the submission in a March 5, 1964 letter to Mr. B.A. LeFevre, Deputy Chief Engineer, NYSDPW. Our approval action on March 5, 1964 would be comparable to Design Approval as defined in current PPM 20-8. (Exhibit VIII)

14. A revision to the approved Preliminary Plans was submitted by NYSDPW on March 23, 1964. The revisions made provided for (1) change in location of North Street from relocated Route 5 to Camillus, (2) change in interchange design of relocated Route 5 and Warners Amboy Road, and (3) a revision to the West Genesee Street interchange. The changes indicated for North

Affidavit of John G. Bestgen.

Street were prompted by local officials because of the disruption of property. BPR approved the revisions in design on April 7, 1964. (Exhibit IX)

15. Another change in design of Camillus-Warners Road (North Street) was proposed by NYSDPW on March 8, 1965. The revisions proposal were as a result of the Camillus School Board objections to the previous plan. The change in design was approved by BPR on March 15, 1965. Geometric design data for the project was submitted on April 3, 1967 by NYSDPW and approved by BPR on June 5, 1967. This design data included revisions in the curvature of the mainline relocation. (Exhibit X)

16. The NYSDOT submitted evidence of coordination with the Central New York Regional Planning and Development Board as required by IM 21-12-67 (Section 204 of the Demonstration Cities and Metropolitan Development Act of 1966) on March 11, 1968. On March 26, 1968, FHWA reconfirmed public hearing dates, preliminary plan approval dates and indicated that the requirements of IM 21-12-67 were satisfied for this project. (Exhibit XI) Our March 29, 1968 letter approved preliminary plans subject to the resolution of several design detail comments. This letter further constituted approval of the design concept for this project.

17. Several design revisions were made to this project, mainly at the westerly terminus of the project, as a result of FHWA comments, "in-house" comments by various NYSDOT departments and continued liaison with local agencies and officials and agencies are documented in the Environmental Reevaluation for this project approved by FHWA on May 26, 1971. (Exhibit XV) (Further discussion of the Environmental Reevaluation is included on page 6 of this affidavit.) The design changes were made throughout the period from March 29, 1968 to development of the final PS&E for constructing this project.

Affidavit of John G. Bestgen.

18. The plan revisions in this period of time consisted of design detail modifications that would not cause substantially different social, economic or environmental effects. The listing of and copies of correspondence relating to the design changes noted above are included as Exhibit XII.

19. PPM 20-8, Public Hearings was revised in January 1969. At that time guidelines were established by BPR to determine the exact public hearing status of all projects "in process" in New York State. The NYSDOT submitted a listing of these projects, including the subject project, on July 28, 1969 with their recommendation as to whether or not further Location and/or Design Hearings were required. The State recommended that no further public hearings be required for the Route 5 project since a public hearing certification had been approved by BPR on March 14, 1962 and subsequent plan reviews and approvals determined that Design Approval had in fact been granted prior to the issuance of new PPM 20-8 dated January 14, 1969. Paragraph 6d of PPM 20-8 is cited as the basis for that determination since both Location and Design Approval had been obtained for this project prior to the issuance of the new PPM. That decision was confirmed in a Sept. 26, 1969 letter to Mr. B.A. LeFevre, Deputy Chief Engineer, NYSDOT. (Exhibit XIII)

20. The FHWA Draft IM of November 24, 1970 (superseded by PPM 90-1) setup interim procedures for Implementation of Section 102(2)(c) of the NEPA of 1969. The draft IM allowed an environmental reevaluation to be prepared in lieu of an EIS for those projects that had received design approval before February 1, 1971 but were (1) on new location or (2) major reconstruction that required right-of-way over at least 50% or more of its length. The relocation of Route 5 project (assigned Project Identification Number PIN 3033.10) met the criteria of paragraph 4c of the Draft IM and the

Affidavit of John G. Eastgen.

NYSDOT was advised by memorandum of March 15, 1971 to prepare a reevaluation. (Exhibit XIV)

21. The NYSDOT submitted the required Environmental Reevaluation on May 20, 1971. The document provides (1) a description of the project, (2) project history, (3) evidence of coordination of the project by NYSDOT with Federal, State and local governments and agencies, (4) an evaluation of the possible environmental significance of the project and steps taken to minimize harm, (5) evaluation of past public hearings, and (6) a description of the benefits expected to result from construction of the project. FHWA approved the Environmental Reevaluation by memorandum of May 26, 1971. (Exhibit XV)

22. IM 20-4-72, Guidelines for Consideration of Economic, Social and Environmental Effects was issued on August 30, 1972 and requires that consideration must have been given to all the points enumerated in paragraph 4.b of the IM prior to approval of the PS&E. The NYS DOT submitted an April 2, 1973 request for concurrence that all the items referred to in IM 20-4-72 had been considered and addressed in the Environmental Reassessment approved on May 26, 1971. FHWA concurred in that determination on April 6, 1973. (Exhibit XVI)

23. The NYSDOT requested FHWA authorization to proceed with the construction of this project by letter dated June 14, 1973. The project was authorized on June 19, 1973. The first advertisement for receipt of bids was made on July 4, 1973. (Exhibit I)

Implementation of National Environmental Policy Act, 1969

24. As noted on page 6, paragraph 20 of this affidavit the guidelines established in the FHWA Draft IM of November 24, 1970 were used to implement NEPA 1969 for this project. It was determined that an Environmental Reevaluation was required for this project prior to taking

Affidavit of John G. Bestgen.

further approval actions regarding the progression of this project. The approved copy of the Environmental Reevaluation is attached as Exhibit XVII.

25. The contents of the Environmental Reevaluation were reviewed by FHWA in light of the Draft IM and NEPA Act guidelines. The information presented in the Environmental Reevaluation was verified thru knowledge of the project, review of the project files and consultation with the NYSDOT. The FHWA review indicated that the project was developed in such a manner as to minimize adverse environmental consequences and the project development was properly coordinated with Federal, State and local governments, officials and agencies.

26. These findings were documented when the FHWA Division Engineer approved the Environmental Reevaluation by memorandum dated May 26, 1971. As indicated in the Draft IM, no environmental statement (FEIS) need be submitted for those projects reevaluated and found to meet the intent of NEPA of 1969.

Chronology of Events referred to in Bestgen Affidavit attached.

CHRONOLOGY OF EVENTS REFERRED TO IN THE
AFFIDAVIT OF DIVISION ENGINEER JOHN G. BESTGEN
IN CONNECTION WITH APPROVAL OF RELOCATED
ROUTE 5 FROM ROUTE 173 WESTERLY TO EXISTING
ROUTE 5, 0.8 MILE WEST OF THE VILLAGE OF
CAMILLUS

- | | | |
|-----|---|--------------------------------------|
| 1. | Location Report and Proposal
for Relocation of Route 5 | December 4, 1956 |
| 2. | Data Sheet and Location Map for
Proposed Relocation | June 10, 1957 |
| 3. | Notice of Public Hearing #1
Prepared by NYSDPW | September 25, 1957 |
| 4. | Public Hearing #1 | October 7, 1957 |
| 5. | Certificate of Public Hearing | February 21, 1958 |
| 6. | Summary of Protests | November 12, 1959 |
| 7. | NYSDPW Resume of Location
Study with Three Alternates | March 2, 1961 |
| 8. | BPR Approval of Three Alter-
nates for Presentation at Public
Hearing | March 20, 1961 |
| 9. | NYSDPW Submission of Transcript
for Joint FHWA-NYSDPW Review
Conference | November 13, 1961 |
| 10. | Notice of Public Hearing #2
by NYSDPW | November 20, 1961 |
| 11. | Public Hearing #2 | December 22, 1961
January 9, 1962 |
| 12. | Summary of Public Hearing
by FHWA | January 30, 1962 |

Chronology of Events referred to in Bestgen Affidavit
attached.

- | | | |
|-----|---|-------------------|
| 13. | Superseded BPR PPM 20-8 | August 10, 1956 |
| 14. | Superseded BPR PPM 20-8(1) | June 16, 1959 |
| 15. | Certification of Public Hearing
by NYSDPW in Accord with Title
23 U.S.C. 128 | January 31, 1962 |
| 16. | BPR Approval of Public Hearing
Certification and Transcript | March 14, 1962 |
| 17. | NYSDPW Submission of Preliminary
Plans, Profile and Typical Sections | December 12, 1963 |
| 18. | NYSDPW Submission of Revised
Preliminary Plans, Profile and
Typical Sections | December 19, 1963 |
| 19. | BPR Approval of Preliminary Plans | March 5, 1964 |
| 20. | NYSDPW Submission of Revised
Preliminary Plans | March 23, 1964 |
| 21. | BPR Approval of Revised Preliminary
Plans | April 7, 1964 |
| 22. | NYSDPW Submission of Design
Change in Camillus-Warners
Road (North Street) | March 8, 1965 |
| 23. | BPR Approval of Design Changes | March 15, 1965 |
| 24. | Design Data Sheets and Location
Map of Project and Request for
Approval of Geometric Design | April 3, 1967 |
| 25. | NYSDOT Submission of February
28, 1968 Coordination Letter with
Central New York Regional Planning
and Development Board | March 11, 1968 |
| 26. | FHWA Approval of IM 21-12-67
Requirements for this Project | March 26, 1968 |

Chronology of Events referred to in Bestgen Affidavit
attached.

27. NYSDPW (NYSDOT) - FHWA Correspondence
Relating to Design Changes in Project Between
February 20, 1968 and May 21, 1973 as
Tabulated Below:
 - A. NYSDOT Submission of Minutes for
January 5, 1968 Plan Conference February 20, 1968
 - B. NYSDOT Submission of Plans and
Data as Discussed at January 5, 1968
Conference March 5, 1968
 - C. FHWA Approval of Minutes and
Plans (DESIGN APPROVAL) March 29, 1968
 - D. NYSDOT Submission of Advance
Detail Plans December 17, 1968
 - E. FHWA Design Comments on
Advance Detail Plans March 4, 1969
 - F. NYSDOT Submission of 1"-200'
Scale Plans for Westerly Terminus April 7, 1969
 - G. FHWA Comments - Westerly
Terminus Plans May 14, 1969
 - H. NYSDOT Reply Comments on
Preliminary and Advance Detail
Plans June 20, 1969
 - I. FHWA Review Comments and
Conditional Approval of Westerly
Terminus Plans June 26, 1969
 - J. NYSDOT Submission of Revised
Plans for Westerly Terminus September 23, 1969
 - K. FHWA Approval and Comments on
Westerly Terminus Plans October 9, 1969
 - L. NYSDOT Submission of Revised
Plans and Westerly Terminus January 23, 1970

Chronology of Events referred to in Bestgen Affidavit
attached.

- M. FHWA Review and Comments on
Westerly Terminus Plans January 28, 1970
- N. NYSDOT Submission of Advance
Detail Plans for Westerly Terminus August 19, 1970
- O. FHWA Review Comments on
Advance Detail Plans for Westerly
Terminus September 18, 1970
- P. NYSDOT Submission of Advance
Final Plans for Entire Route 5 Project April 26, 1973
- Q. FHWA Comments on Advance
Final Plans May 21, 1973
- 28. FHWA PPM 20-8, Public Hearings and
Location Approval Which Superseded PPM's
20-8 and 20-8(1) January 14, 1969
- 29. NYSDOT Findings and Recommendations
that no Further Hearings Required for
Relocation of Route 5 (PIN 3033.10) July 28, 1969
- 30. FHWA Concurrence that Design Approval
Received for PIN 3033.10 and no Further
Hearings Required September 26, 1969
- 31. FHWA Notice, Implementation of NEPA
1969 with Pertinent Portions of Draft
IM November 24, 1970 November 30, 1970
- 32. FHWA Finding that Environmental
Reevaluation Required for PIN 3033.10 March 15, 1971
- 33. NYSDOT Submission of Environmental
Reevaluation May 20, 1971
- 34. FHWA Approval of Environmental
Reevaluation May 26, 1971

Chronology of Events referred to in Bestgen Affidavit
attached.

- 35. NYSDOT Submission and Findings
Regarding IM 20-4-72 and FHWA
Concurrence in Findings April 2, 1973
April 6, 1973
 - 36. FHWA PR-1240, Letter of PS&E
Approval and Authorization for
Projects F-U-446(22) and S-SU-
929(2) to Advertise for Receipt
of Bids June 19, 1973
 - 37. NYSDOT Letter Requesting Approval June 14, 1973
-

Schedule of Exhibits attached to Bestgen Affidavit.

<u>EXHIBIT</u>	<u>CONTENTS</u>	<u>Item Reference In Chronological Listing</u>
I	FHWA PR-1240, Letter of PS&E Approval and Authorization for projects F-U-446(22) and S-SU-929(2) to advertise for receipt of bids dated June 19, 1973	36
	NYSDOT June 14, 1973 letter requesting approval	37
II	State DPW Location Report, 12/4/56	1
	Data Sheet and Location Map of Proposed Route, 6/10/57	2
III	Certificate of Public Hearing, 2/21/58	5
	Summary of Protests, 11/2/59	6
IV	NYSDPW Resume of Location Study with Three Alternates, 3/2/61	7
	BPR Approval of Three Alternates for Presentation at Public Hearing, 3/20/61	8
	NYSDPW Submission of Transcript for Joint FHWA-NYSDPW Review Conference, 11/13/61	9
V	Notice of Public Hearing #2 by NYSDPW, 11/20/61	10
VI	Summary of Public Hearing by FHWA, 1/30/62	12
VII	Superseded BPR PPM 20-8, 8/10/56	13

Schedule of Exhibits attached to Bestgen Affidavit.

<u>EXHIBIT</u>	<u>CONTENTS</u>	<u>Item Reference In Chronological Listing</u>
	Superseded BPR PPM 20-8(1), 6/16/59	14
	Certification of Public Hearing by NYSDPW in Accord with Title 23 U.S.C. 128, 1/31/62	15
	BPR Approval of Public Hearing Certification and Transcript, 3/14/62	16
VIII	NYSDPW Submission of Prelim- inary Plans, Profile and Typical Sections, 12/12/63	17
	NYSDPW Submission of Revised Preliminary Plans, Profile and Typical Sections, 12/19/63	18
	BPR Approval of Preliminary Plans, 3/5/64	19
IX	NYSDPW Submission of Revised Preliminary Plans, 3/23/64	20
	BPR Approval of Revised Pre- liminary Plans 4/7/64	21
X	NYSDPW Submission of Design Change in Camillus-Warners Road (North Street) 3/8/65	22
	BPR Approval of Design Changes, 3/15/65	23
	Design Data Sheets and Location Map of Project and Request for Approval of Geometric Design, 4/3/67	24

Schedule of Exhibits attached to Bestgen Affidavit.

<u>EXHIBIT</u>	<u>CONTENTS</u>	<u>Item Reference In Chronological Listing</u>
XI	NYSDOT Submission of February 28, 1968 Coordination Letter with Central New York Regional Planning and Develop- ment Board 3/11/68	25
	FHWA Approval of IM 21-12-67 Requirements for this Project, 3/26/68	26
XII	NYSDPW (NYSDOT) - FHWA Correspondence Relating to Design Changes in Project Between February 20, 1968 and May 21, 1973	27
XIII	FHWA PPM 20-8, Public Hearings and Location Approval Which Super- seded PPM's 20-8 and 20-8(1), 1/14/69	28
	NYSDOT Findings and Recommen- dations that no Further Hearings Required for Relocation of Route 5 (PIN 3033.10), 7/28/69	29
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XIV	FHWA Notice, Implementation of NEPA 1969 with Pertinent Portions of Draft IM 11/24/70, 11/30/70	31
	FHWA Finding that Environmental Reevaluation Required for PIN 3033.10	32

Schedule of Exhibits attached to Bestgen Affidavit.

<u>EXHIBIT</u>	<u>CONTENTS</u>	<u>Item Reference In Chronological Listing</u>
XV	NYSDOT Submission of Environmental Reevaluation 5/20/71	33
	FHWA Approval of Environ- mental Reevaluation 5/26/71	34
XVI	NYSDOT Submission and Findings Regarding IM 20-4-72 and FHWA Concurrence in Findings 4/2/73, 4/6/73	35
XVII	Environmental Re-evaluation, 4/16/71	33

MEMORANDUM-DECISION AND ORDER.

(SAME TITLE).

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EDMUND PORT, Judge

Memorandum-Decision and Order

In this action injunctive relief is sought to restrain

Memorandum-Decision and Order.

construction of the "Camillus Bypass" 1/, a partially federally funded road project.

The complaint was filed on October 26, 1973, together with a motion seeking a temporary restraining order, or in the alternative directing an immediate hearing on the merits of the plaintiff's application for a temporary injunction. The motion was made returnable on October 30, 1973 but was never heard. Prior to the return day the parties reported to the court that they were entering into discussion to resolve their differences and it appeared that those discussions would be successful. Subsequently, the parties stipulated that the defendants' time to submit answers would be extended until ten days after a written demand was made therefor by the plaintiff's attorneys. Such demand was later made when the court was advised that the defendant Schuler had broken off all further discussions. The matter came on for hearing before the court on February 7, 1974.

It was stipulated in open court that the matter of a preliminary and permanent injunction should be heard by the court upon the written material presented without an evidentiary hearing.

THE PROJECT AND ADMINISTRATIVE
PROCEEDINGS

The project, briefly described, originates at the intersection of Routes 5 and 173 near the Fairmount Fair Shopping Center, moves westerly and to the north of Route 5, and terminates at a point about 5 miles distant, situated just west of Camillus. About 3 1/2 miles are scheduled to be six lane divided highway and the remainder is to be four lane. 2/ Additionally, the reconstruction or improvement of about six miles of existing crossroads is planned, 3/ including the relocation of about 1 1/2 miles of North Street (Camillus-Warners Road - Route 36). 4/

Memorandum-Decision and Order.

The cost of the Route 5 relocation proper is about \$20 million of which about \$8 million are federal funds. The cost of the North Street relocation is about \$2 million; half being federally financed. 5/

Hearings were held for this project on October 7, 1957 and December 22, 1961, 6/ and an opportunity for another as to a small portion of the project was granted in mid 1962 by newspaper notice. 7/ No other hearings were held, nor were any other opportunities for hearings afforded. The defendant Secretary of Transportation of the United States granted approval of the Plans, Specifications and Estimates (PS&E) on June 19, 1973. 8/

The defendants do not question the fact that this is a "major federal action significantly affecting the quality of the human environment" which ordinarily requires an environmental statement. No claim is made by the defendants that such a statement was, in fact, filed.

The plaintiff contends that the defendants have failed to comply with the hearing requirements of §128 of the Highway Act (23 U.S.C. §128) as amended in 1968 and 1970; 9/ failed to comply with the provisions of NEPA because of the failure to file an environmental impact statement; 10/ and that as a result, the PS&E approval by the federal officials was unlawful. 11/ The last hearing in connection with this project was held in 1962. Obviously, it did not meet the requirements of the 1968 and 1970 amendments.

Why the PS&E approval was granted under these circumstances remains somewhat of a mystery. This was done in the face of the holding in Monroe County six months earlier that the amendments to §128 require expanded hearings "whenever PS&E approval has not been given prior to the effective date of the amendment. This rule is based upon the fact that a hearing is a condition precedent to the granting of federal aid, and,

Memorandum-Decision and Order.

therefore, the Secretary must apply the statute which is in effect when he awards that aid." 12/

With reference to the need for an environmental impact statement: "[t]his approval [PS&E] in the present case was not given prior to the effective date of NEPA, and, therefore, an impact statement must be prepared... 13/ The environmental reevaluation substituted will not suffice. 14/

As has been indicated earlier it is difficult to understand why the state officials would seek approval and why the federal officials would grant PS&E approval six months after the determination of the Monroe County case which at the very least would indicate to them that such conduct, if contested, would be found to run counter to the controlling law in this circuit. When questioned along these lines upon oral argument the only response of the defendants was the highly implausible one of an unawareness of Monroe County in spite of the fact that the Secretary of United States Department of Transportation was the party enjoined. The more likely reason seems to be that they took a calculated risk that their action would not be challenged. In view of the disputes that shadow this project throughout its course it is not surprising that the risk turned out to be a poor one.

Although initially, the defendants contested the standing of the plaintiff, in their proposed findings of fact they concede the standing of the plaintiff. The court finds that the plaintiff has standing. 15/

The defendants also, without detail or specification, claim the expenditure and incurring of large sums in connection with the ongoing project in support of a laches defense. 16/ However, in view of the circumstances surrounding the application for the granting of the PS&E approval this defense requires little discussion. It smacks of the defendant who, having murdered his mother and father, pleads for leniency on the grounds that he is an orphan.

Memorandum-Decision and Order.

The violations of NEPA and the Highway Act have resulted in irreparable injury to the plaintiff entitling it to injunctive relief. 17/ The court has jurisdiction of the parties 18/ and the subject matter of this action. 19/

This Memorandum Decision, together with stipulation of facts annexed hereto as an appendix and made a part hereof shall constitute the findings of fact and conclusions of law.

For the reasons herein, it is

ORDERED, that defendant Brinegar shall in all respects comply with the requirements of Section 102 of the National Environmental Policy Act (42 U.S.C. §4332(2)(c)); and it is further

ORDERED, that defendant Schuler shall in all respects comply with the requirements of Section 128 of the Federal Aid Highway Act (23 U.S.C. §128); and it is further

ORDERED, that defendant Brinegar, his successors, agents, servants and employees and defendant Schuler, and his respective successors, agents, servants and employees be and they hereby are enjoined and restrained, as of the date of this order, from disbursing or receiving any further federal funds either for construction or materials, heretofore or hereafter provided, with respect to PIN 3033.10 until the court, after proper hearing on notice, is satisfied that this order has been complied with.

s/ EDMUND PORT
United States District Judge

Dated: March 20, 1974
Auburn, New York

Memorandum-Decision and Order.

FOOTNOTES

1/ Also known as "relocated Route 5" and Project Identification Number (PIN) 3033.10. This project is funded by the authority of the Federal Aid Highway Act. 23 U.S.C. §§101 et seq..

2/ Bestgen Affidavit, ¶4. See map of project area in Bestgen Exhibit XVII.

3/ Other roads affected are: Maple Drive, Ed Dixon Road (also known as Rolling Hills Road), Bennett Road, Hinsdale Road, Warners Road (Route 173), and Fairmount-Belle Isle Road. Bestgen Exhibit XVII, p. 2.

4/ Bestgen Affidavit, ¶5.

5/ Bestgen Exhibit I.

6/ Stipulation, ¶¶1, 2. The latter hearing was carried over to include a second day (1/9/62). See the summary of this hearing in Bestgen Exhibit VI.

7/ Stipulation, ¶3.

8/ Stipulation, ¶4.

9/ The 1968 amendment adds social and environmental factors to economic factors as the items to be studied and developed at the hearings. The 1970 amendment calls for the submission of a certifying report as to these studies.

10/ The National Environmental Policy Act (NEPA) mandates the preparation of such an "impact statement". 42 U.S.C. §§4321, 4332(2)(C).

Memorandum-Decision and Order.

11/ This contention is based on the authority of Monroe County Conservation Council v. Volpe, 472 F.2d 693 (2nd Cir. December 18, 1972).

12/ 472 F.2d at 701. The Monroe County opinion clearly controls the disposition of the present case. Its rationale was adopted by this court on Nov. 14, 1973. Capitol Region Citizens Committee v. Volpe, 72-CV-254 (N.D.N.Y. 11/14/73).

13/ 472 F.2d at 699.

14/ The "reevaluation" prepared under the authority of Draft Instructional Manual ¶4(c) [See Bestgen Affidavit, ¶¶20, 21, 22; Exhibit XVII] is connected to FHWA efforts to postpone the effective date of NEPA by 13 months [See Committee to Stop Route 7 v. Volpe, 346 F. Supp. 731, 736-737 (D. Conn. 1972); Conservation Society of Southern Vermont v. Volpe, 343 F. Supp. 761, 767 (D. Vt. 1972)] and to rely on an antecedent "equivalent" theory of design approval as the date from which to measure statutory applicability [Committee to Stop Route 7, 346 F. Supp. at 735-736. See also D.C. Federation of Civic Associations v. Volpe, 316 F. Supp. 754, 781-785 (D.D.C. 1970) rev'd on other grounds 459 F.2d 1231, 1342 (D.C. Cir. 1972) cert. den. 405 U.S. 1030 (1972)]. Agencies in general must comply with NEPA to the "fullest extent possible." Calvert Cliffs Coordinating Committee v. A.E.C., 449 F.2d 1109, 1117-1119 (D.C. Cir. 1971). As regards the "reevaluation" in particular "a second look by the state as to whether environmental damage has been minimized cannot be substituted for a first look by the agency obligated by federal law to determine whether the environment should be damaged at all." Committee to Stop Route 7, 346 F. Supp. at 739.

Memorandum-Decision and Order.

^{15/}Sierra Club v. Morton, 405 U.S. 727 (1972); Citizens Committee For the Hudson Valley v. Volpe, 425 F.2d 97, 105-106 (2nd Cir. 1970) cert. den. 400 U.S. 949 (1970).

^{16/}See Ward v. Ackroyd, 344 F. Supp. 1202, 1212-1213 (D. Md. 1972).

^{17/}See Gulf & Western v. A & P Company, 476 F.2d 687, 692-693 (2nd Cir. 1973); West Va. Highlands Conservancy v. Island Creek Coal Co., 441 F.2d 232, 235-236 (4th Cir. 1971). Moreover, no bond appears to be necessary under the cases and the same is hereby dispensed with. Powelton Civic Homeowners Association v. H.U.D., 284 F. Supp. 809, 839-341 (E.D. Pa. 1968).

^{18/}See, Pa. Environmental Council v. Bartlett, 454 F.2d 613, 624-625 (3rd Cir. 1971).

^{19/}Jurisdiction is properly invoked under the Federal Question statute (28 U.S.C. §1331), the Mandamus statute (28 U.S.C. §1361), the Declaratory Judgment Act (28 U.S.C. §§2201-2202), and the Administrative Procedure Act (28 U.S.C. §§701-706). Derivative jurisdiction is given by the NEPA (42 U.S.C. §§4321 et seq.) and by the Federal Aid Highway Act (23 U.S.C. §§101 et seq.).

STIPULATION.

(SAME TITLE).

IT IS HEREBY STIPULATED AND AGREED by and between the attorneys for the respective parties hereto, as follows:

1. A public hearing was held on this project on October 7, 1957.
2. A public hearing was held on this project on December 22, 1961 and January 9, 1962.
3. Notice of opportunity for a public hearing was published on June 22 and June 29, 1962, in connection with the section from North Street to Newport Road, County Road 36. No requests for a public hearing were received. The publication of the notice of opportunity for a public hearing was certified to the Bureau of Public Roads (BPR) on July 11, 1962, and BPR approval thereof obtained on August 2, 1962.
4. The project was never advanced to the construction stage until PS&E approval was obtained on June 19, 1973, from FHWA. Bids were opened on August 9, 1973, the contract awarded to D. W. Winkleman Co., Inc., by letter on August 13, 1973, the contract approved by the Comptroller of the State of New York on September 24, 1973 and construction commenced on September 27, 1973.
5. The State of New York began acquiring right of way on May 29, 1968.
6. The plan presented at the public hearing held on December 22, 1961 and January 9, 1962, included a bridge at Rolling Hills Road (Ed Dixon Road).
7. The plan presented at the December 22, 1961 and January 9, 1962 public hearing proposed an at-grade intersection at the junction of existing Route 5 (W. Genesee St.) and the new Camillus By-Pass. Subsequent advance detail plans submitted to FHWA on December

Stipulation.

12, 1968 included a 3-legged Y interchange with a grade separation of westbound and eastbound relocated Route 5 over existing westbound Route 5. Revised advance detail plans for the westerly terminus, submitted to FHWA on August 17, 1970, included the present scheme which provides for a two-quadrant cloverleaf interchange and the extension of Route 5 to the west on new location.

8. The plan presented at the December 22, 1961 and January 9, 1962 public hearing provided for the westerly terminus of the project approximately 1,200' east of Ike Dixon Road. The present scheme provides for the westerly terminus approximately 300' west of Ike Dixon Road. The changes effected at the westerly terminus were made at the request of the Town of Camillus in order to improve the poor sight distance on existing Route 5 at the Ike Dixon Road intersection, to improve the approach to the combined horizontal and vertical curve at the crest of the West Camillus Hill and to improve the intersection capacity at Ike Dixon Road.

9. Based on comments received at the December 22, 1961 and January 9, 1962 public hearing, the interchange facilities at North Street were changed to include a relocation of North Street with 1/2 diamond interchange connections to the east.

10. The plan presented at the December 22, 1961 and January 9, 1962 public hearing showed the highway crossing Nine Mile Creek approximately 900' east of the present crossing.

11. The population of the Town of Camillus in 1950 was 6,735; in 1960 18,328; and in 1970 26,841.

12. The population of the Village of Camillus in 1950 was 1,225; in 1960, 1,416, and in 1970 1,534.

13. Two regional shopping centers have been built, Fairmount Fair and Camillus Plaza.

Stipulation.

14. A school complex has been built on Ike Dixon Road within a few hundred feet of its intersection with existing Route 5.

15. Traffic counts on existing Route 5 were as follows:

a. At a location 1.2+ miles west of the Route 5-Route 173 intersection (Mile point 50811235). This is located approximately 2 miles east of the Village of Camillus.

Year	Month	Vehicles/Day (2 Way Count)
1960	Sept.	16,122
1961	"	20,003
1963	Nov.	18,100
1964	Sept.	15,292
1965	"	22,052
1966	"	22,995
1967	"	20,038
1969	"	23,170
1970	"	22,392
1971	"	22,550
1972	"	22,423
1973	"	21,852

b. At a location between Bennetts Cors. and the Route 5-Route 174 intersection. Bennetts Cors. is 3+ miles west of the Village of Camillus. The Route 5-Route 174 intersection is in the Village of Camillus.

Year	Month	Vehicles/Day (2 Way Count)
1964	April	6,603
"	July	6,435
"	Sept.	7,182
1970	April	6,700
"	July	6,890
"	Sept.	10,950

Stipulation.

Year	Month	Vehicles/Day (2 Way Count)
1973	April	8,810
"	July	9,020
"	Sept.	8,430

DATED: February 7, 1974

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BY s/RICHARD A. SCHECHTER

**ORDER TO SHOW CAUSE FOR RELIEF
PURSUANT TO RULE 60(b).**

(SAME TITLE).

**ORDER TO SHOW CAUSE
FOR RELIEF PURSUANT
TO RULE 60(b)**

Upon the Memorandum-Decision and Order herein dated March 20, 1974, upon the affidavit of William C. Hennessy, sworn to July 16, 1974, and upon all the papers and proceedings heretofore had herein, let the plaintiffs, or their attorneys, show cause before this Court at a term thereof to be held at the United States Courthouse, Auburn, New York, on July 22, 1974, at 2 p.m., or as soon thereafter as counsel can be heard, why an order should not be made and entered pursuant to FRCP, Rule 60(b), modifying the above-mentioned Memorandum-Decision and Order, dated March 20, 1974, to delete the final decretal paragraph enjoining and restraining the disbursement or receipt of further federal funds, either for construction or materials, with respect to PIN 3033.10.

Let service in accordance with the FRCP upon plaintiffs' attorneys and the United States Attorney of a copy of this order and the moving papers upon which the same was granted on or before July, 1974, be deemed good and sufficient service.

DATED: Albany, New York
July 16, 1974

s/ JAMES T. FOLEY
United States District Judge

STATE OF NEW YORK)
) ss.:
COUNTY OF ALBANY)

1. I am Assistant Commissioner for Transportation Operations for the New York State Department of Transportation. I make this affidavit in support of the defendant Raymond T. Schuler's application to modify the Memorandum-Decision and Order of this Court dated March 20, 1974.

"ORDERED, that defendant Brinegar shall in all respects comply with the requirements of Section 102 of the National Environmental Policy Act (42 U.S.C. §4332(2)(c)); and it is further

"ORDERED, that defendant Schuler shall in all respects comply with the requirements of Section 128 of the Federal Aid Highway Act (23 U.S.C. §128); and it is further

Affidavit of William C. Hennessy in Support of Application
to Modify Memorandum-Decision and Order.

"ORDERED, that defendant Brinegar, his successors, agents, servants and employees and defendant Schuler, and his respective successors, agents, servants and employees be and they hereby are enjoined and restrained, as of the date of this order, from disbursing or receiving any further federal funds either for construction or materials, heretofore or hereafter provided, with respect to PIN 3033.10 until the court, after proper hearing on notice, is satisfied that this order has been complied with."

This application seeks relief from the last above-quoted decretal paragraph. The State Department of Transportation intends to comply with the first and second decretal paragraphs to the fullest extent possible.

3. Since the date of the order, March 20, 1974, construction was suspended and all necessary steps taken to protect the environment and the public. This was done after considerable deliberation and after a determination by Commissioner Schuler that it would be economically imprudent to proceed with the project without federal financial participation.

4. During the period since March 20, 1974, negotiations have continued between the plaintiffs, the New York State Department of Transportation, the Federal Highway Administration and other interested persons. It appears to be the consensus of the parties to such negotiations that the timely completion of the Camillus By-Pass project would best serve the interests of the communities involved and the residents thereof.

5. Accordingly, an agreement between the parties to the litigation has been reached and reduced to the form of a stipulation. An unexecuted copy thereof is attached hereto and made a part hereof as Appendix "A". The

Affidavit of William C. Hennessy in Support of Application
to Modify Memorandum-Decision and Order.

original is to be executed within the next few days and will be presented to the Court upon the return date of the application. Briefly, the stipulation provides that a separate proposed Federal-aid project will be initiated for the bridging of Rolling Hills Road at its intersection with the By-Pass, that the planned service road connecting Old North Street to Rolling Hills Road will be extended to connect with Maple Drive at its intersection with the By-Pass and that several minor design changes at the westerly terminus will be effectuated to provide greater safety in the area of Ike Dixon Road. It further provides, subject to the approval of the Court, that the present project may be progressed with Federal-aid funds while Federal hearing and environmental impact statement requirements are being met in connection with the proposed bridging of Rolling Hills Road.

In light of the foregoing, it is respectfully requested that this Court's Memorandum-Decision and Order dated March 20, 1974, be amended and modified by deleting the last decretal paragraph thereof to permit federal funds to participate in the completion of PIN 3033.10.

s/ WILLIAM C. HENNESSY

(Sworn to July 16, 1974).

**Appendix A — Stipulation
attached to Hennessy Affidavit.**

[The unexecuted Stipulation attached hereto is
the same as the signed Stipulation printed
herein infra at page 72].

STIPULATION, dated 7-17-74.

(SAME TITLE).

IT IS HEREBY STIPULATED AND AGREED by and between the undersigned, attorneys for the parties to this action, as follows:

WHEREAS plaintiffs have commenced litigation alleging that a certain highway construction project, referred to as the Camillus Bypass, was progressing in violation of the Federal Highway Act and the National Environmental Policy Act, and

WHEREAS said litigation concluded with a Memorandum-Decision and Order issued by United States District Judge Edmund Port, dated March 20, 1974, which imposed an injunction on the further use of Federal funds for the subject project, and which required the defendants Brinegar and Schuler to comply with applicable Federal law, and

WHEREAS defendant Schuler determined it to be in the best public interest that construction of the subject project be suspended during the unavailability of Federal funds, and

WHEREAS since the effective date of the aforesaid Memorandum-Decision and Order, the parties to this litigation have engaged in numerous meetings and discussions for the purpose of exploring alternatives which would permit continued construction of the Camillus Bypass while, at the same time, would comply with the Court's directives, and

WHEREAS all parties recognize that the Camillus Bypass is an important and necessary addition to the highway system serving Camillus and neighboring communities:

1. The New York State Department of Transportation will immediately initiate a separate proposed Federal-aid

Stipulation, dated 7-17-74.

project for the bridging of Rolling Hills Road at the point of intersection between the project known as Camillus Bypass and said Rolling Hills Road. The project initiation process is one which establishes and recognizes the need to consider the project and the requirements with respect to construction of such project. The New York State Department of Transportation agrees in the Project Initiation Process to accept as a given fact the need for the project and the process will develop the other information and data normally required for a new project.

2. As expeditiously as possible the New York State Department of Transportation will develop the design criteria for the bridging of Rolling Hills Road.

3. The New York State Department of Transportation will, as soon as possible, propose a consultant to prepare a draft Environmental Impact Statement for the bridge project. The plaintiffs will be consulted with regard to the consultant to be selected. In addition no such consultant will be employed by the New York State Department of Transportation if such consultant is unacceptable to the plaintiffs. It is understood that the responsibility for development of environmental statistical data and writing of the draft Environmental Impact Statement has been delegated by the Federal Highway Administration to the State and it is further understood that the preparation of an Environmental Impact Statement and related statements pursuant to the National Environmental Policy Act is the primary responsibility of the Federal Highway Administration.

4. In connection with the bridging of Rolling Hills Road project a Public Hearing or an opportunity for a Public Hearing, conducted in conformity with the provisions of Section 128 of Title 23, U.S. Code, will be held by the New York State Department of Transportation in an expeditious manner, the said hearing to be held in the evening in the Town of Camillus.

Stipulation, dated 7-17-74.

5. Following approval of the draft Environmental Impact Statement by the Federal Highway Administration it will be circulated to all requisite officials, agencies and individuals, including in particular the plaintiffs, in order that all may give their review and comment with respect thereto.

6. At all stages throughout the processing of the bridge project, the New York State Department of Transportation agrees that it will not be influenced in its decisions with respect thereto as a result of any previous construction plans calling for non-construction of bridging at Rolling Hills Road and further it will not inhibit in any way the expeditious processing of the bridge project.

7. If the hearing process and the National Environmental Policy Act process do not contraindicate the desirability of construction of bridging of Rolling Hills Road and the project meets the then existing Federal requirements, including the planning process with local consent and approval of the project in urban areas as set forth in Section 134 of Title 23 of the U.S. Code, the New York State Department of Transportation agrees to undertake the design and construction of said project in an expeditious manner.

8. The parties hereto agree, subject to the approval of the Court, that the present project will be permitted to be constructed with the use of Federal-aid highway funds at the same time the public hearing requirements and the Environmental Impact Statement requirements are being fulfilled as provided in paragraphs 3 and 4 above.

9. The plaintiffs agree not to reinstitute further litigation with respect to the causes of action set forth in the complaint of the subject action while the construction of the Camillus Bypass project is proceeding as long as the terms and conditions of this stipulation and agreement are being observed by the defendants.

Stipulation, dated 7-17-74.

10. The foregoing shall not be construed as a representation by or on behalf of the defendant Claude E. Brinegar, the U.S. Department of Transportation or the Federal Highway Administration that they or any of them will approve any project or proposed projects described herein or any part thereof until applicable provisions of law are met and then only to the extent that Federal funds are available.

11. On July 3, 1974, at a meeting of representatives of the New York State Department of Transportation and the Camilius West Homeowners' Association, certain changes in the design of the Camillus Bypass were agreed upon by the parties. The plaintiff and the New York State Department of Transportation hereby agree to incorporate these design changes into the design of the Camillus Bypass, to alter all plans, specifications and contracts to reflect the said design changes, and to do all acts which may prove necessary to effect the said design changes, including the appropriation of additional lands. The said design changes are accurately reflected upon a map, appended to and made a part hereof. The said map being one initialed by Mr. Spencer Givens upon the meeting of July 3, aforementioned. In particular, the following design changes are among those reflected upon the said map:

A. A service road will be constructed to connect the present Maple Drive, at its juncture with the proposed Bypass to present Rolling Hills Road at its juncture with the Bypass. The said service road will connect at Rolling Hills Road with the service Road presently planned from Old North Street to present Rolling Hills Road.

B. The ramp designated SEL will be eliminated. Ramp SCM will be modified to dual lanes, one directing traffic to the easterly direction on Route 5 and ending at a stop sign, and one directing traffic onto a westerly direction on Route 5 ending with a yield sign.

Stipulation, dated 7-17-74.

C. Redesign of the intersections of Route 5 and Maple Drive with Ike Dixon Road as follows:

- a. Signalization of the intersection of Ike Dixon Road and Route 5.
- b. Extension of four lane width portion of Route 5 a greater distance beyond Ike Dixon Road.
- c. Turn lane provisions at the intersection of Ike Dixon Road and Route 5 by means of medians.
- d. Ike Dixon Road widened to four lanes past Maple Drive.
- e. Maple Drive widened, and a left turn lane provided at the intersection of Maple Drive and Ike Dixon Road by means of a median.

Dated: July 17, 1974
Albany, New York

URCIUOLI & COVINO
Attorneys for Plaintiff

BY s/
RICHARD A. SCHECHTER, ESQ.

HON. LOUIS J. LEFKOWITZ
Attorney General
Attorney for Defendant Schuler

BY s/ DOUGLAS S. DALES, JR.
Assistant Attorney General

HON. JAMES M. SULLIVAN, JR.
United States Attorney
Attorney for Defendant Brinegar

BY s/ GEORGE H. LOWE
Assistant U.S. Attorney for
Northern District of New York

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

- - - - -
- CAMILLUS WEST HOME OWNERS ASSOCIATION, INC. -

-
- -against- -

- CLAUDE E. BRINEGAR and RAYMOND T. SCHULER -
- - - - -

Civil No. 73-CV-481

The following proceedings took place on the 22nd
day of July 1974 at the United States District Court,
Northern District of New York, Federal Building, Auburn,
New York before HONORABLE EDMUND PORT, United States
District Judge.

A P P E A R A N C E S:

BLITMAN & KING, ESQS.

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Of Counsel

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Operating Engineers and Local 12
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FLETCHER KRAUSE

Regional Counsel,

Federal Highway Assn.

Attorney for Claude E. Breingar

RICHARD SCHECTER, ESQ.
Attorney for Petitioners

JOHN F. GATES, ESQ.
Town Attorney

RAYMOND SAXE
Pre se.

THE COURT: All right, do I have the appearances now? Will you give me the appearances in this case?

MR. LOWE: Your Honor, George H. Lowe, on behalf of the defendant Claude E. Brinegar.

MR. DALES: Douglas S. Dales, Jr., Assistant Attorney General, I appear for the movant, Raymond T. Schuler.

MR. KING: For the intervenor, Blitman & King by Bernard T. King.

THE COURT: I didn't have any motion for intervention, did I?

MR. KING: There is a motion for intervention and the case was and it is still our present position that it has been resolved subject to the resolution of the underlying mandate.

THE COURT: Well, it isn't being submitted to me now, is it? My recollection as to that motion was that it was on the calendar and it was held generally. There was an application on behalf of the operating engineers, wasn't there?

MR. KING: Operating Engineers and the carpenters.

THE COURT: To intervene?

MR. KING: Yes, Your Honor.

THE COURT: Now is that motion before me today?

MR. KING: It was my understanding that it was on the calendar today with the other motion. However, we have a stipulation with all parties to a withdrawal of that motion subject to the settlement of the other issues, so perhaps unless you have some reservation about it being on the calendar at all today, we could merely put it in behind the other motion.

THE COURT: All right, are there other appearances?

MR. SCHECHTER: Richard Schechter, I am appearing on behalf of the Camillus West Home Owners Association.

MR. LOWE: Your Honor, could I introduce to the Court Mr. Fletcher Krause, the Regional Counsel of the Federal Highway Association and ask his appearance be noted also.

THE COURT: All right.

MR. SAXE: If it please the Court, I am Raymond Saxe. I am affected by these proceedings and I ask the permission of the Court to be heard at the proper time, if I may.

THE COURT: All right. You are not an attorney,

I take it?

MR. SAXE: No, sir, I am not.

THE COURT: You are not represented by an attorney?

MR. SAXE: No, sir. I can have an attorney here if this hearing is adjourned, but I talked with the attorney and he said he thought for the purposes of this present proceeding I could probably say what has to be said myself.

THE COURT: All right. I won't note your formal appearance but I will permit to make any statement you care to to the Court if it is pertinent to the proceeding before me.

MR. SAXE: Thank you, Your Honor.

THE COURT: Now the matter before me is on the return of an order to show cause to modify a judgment of March 20, 1974 in this case pursuant to the Federal Rules of Civil Procedure, Rule 60-B, is that right?

MR. DALES: That's correct, Your Honor.

THE COURT: And the defendant Schuler is the movant?

MR. DALES: Yes, Your Honor.

THE COURT: All right, I will hear you.

MR. DALES: Your Honor, this is a motion to amend the last paragraph of Your Honor's injunction dated

the 10th of March. Since the date of that injunction there have been numerous conferences, meetings and discussions with interested parties, including some people not parties to the litigation, but all with a view to attempting to get this highway project moving if there were any conceivable way to do it, and it has culminated in a stipulation between the parties to the litigation which is appended to the order to show cause which Judge Foley signed. The original I have here. There is one amendment that has to been made to the copies that are initialled by the parties, but other than this minor change it is as appended.

THE COURT: What I have is an undated, unexecuted

--

MR. DALES: That's correct.

THE COURT: Stipulation.

MR. DALES: Yes.

THE COURT: That is what I ~~is~~ued this show cause
-- or Judge Foley issued the show cause order on.

MR. DALES: Yes, the original is here, it has been signed by the parties. The last one was just recently signed. There is one amendment on page two which has not been initialled yet by the parties but is of a minor nature, and once this is done I would ask that this be filed as part of the record.

THE COURT: All right.

MR. DALES: Additionally, Your Honor, I have prepared a memorandum of law, very short.

THE COURT: Well, I have had your memorandum, haven't I?

MR. DALES: Not in this case.

Very briefly, Your Honor, our position is that the modification of an injunction is part of the inherent equitable powers that this Court possesses, and I have cited in the memorandum three cases in which modification has been permitted, or the construction has been permitted to proceed pending compliance with the provisions of law that were found to be in non-compliance in these particular cases.

Now the two areas of irreparable injury that were urged upon this Court in February when this matter came on for hearing, the lack of bridging at the Rolling Hills Road, they characterize it as a China Wall that we were putting up, we have by the stipulation agreed to institute a project in connection with that, and the second area of concern to the plaintiff, the allegedly dangerous intersection where the Central School Exit was also has been the subject of some modification to a more safe condition, and we submit that in view of these acts which have occurred since the date of the order that

modification of the injunction is warranted.

THE COURT: Mr. Love?

MR. LOWE: The defendant Brinegar has executed the stipulation, or we have executed the stipulation on his behalf and will initial the short change that he referred to, and the defendant Brinegar does not oppose the motion made by the defendant Schuler.

THE COURT: Do you urge the Court to grant it?

MR. LOWE: Yes, sir we do.

THE COURT: All right.

MR. SCHECTER: Your Honor, on behalf of the Camillus West Home Owners Association we have also signed the stipulation and we are in agreement with its terms.

We feel basically the public hearing and the environmental statement process which will still take place, but this way the road will be able to progress.

The serious environmental concerns that my clients had has been solved by the stipulation, the changes that the defendants have agreed to, and therefore we would also urge this on the Court.

THE COURT: You want to be heard Mr. King?

MR. KING: I don't think, Your Honor, at this point that there is anything that I would -- in other words, I don't have any standing in this particular motion only to say that our motion, it is part of the

understanding and stipulation, that our motion would be withdrawn upon the settlement of this order as proposed by the State.

THE COURT: Mr. Saxe, do you want to address the Court?

MR. SAXE: Yes, if I might, sir.

This motion is presented as though the only plaintiff is the Camillus West Home Owners. I should say I am the Treasurer of the Camillus West Home Owners, although I am appearing as an individual. I don't think the statement that they are the only plaintiffs is correct, I think it goes far beyond that.

This suit was brought on behalf of all other similarly situated. The Camillus Home Owners did not have the resources to prosecute this case by itself. From the very beginning they sought aid and assistance from outside their own organization. There were more than 2,000 circulars that went out. So far as financing is concerned, I would say as of a month ago all the money -- of all the money contributed, probably 25% came from members of the Camillus Home Owners and 75% came from those outside of the organization.

THE COURT: You are the Treasurer, you say?

MR. SAXE: Yes. There was a fund drive conducted in the village of Camillus. People went from

house to house asking for funds. People that gave money were assured they would be given a hearing. The largest single amount of money came from the merchants of the village of Camillus. They were assured that their needs would be considered and that they would be given a hearing.

However, when it came time for the meeting to be held and this present stipulation to be considered, these people who had given money were not advised, they were not told, they were not informed, they were given no opportunity to express an opinion.

I have here the official call of a meeting which reads as follows: "Negotiations during the past month have been chaired by Senator Lombardi's office. These have received no publicity. You are requested to not discuss this matter outside of the membership."

I have here a letter dated June 23 which says that the home owners representing the entire community will meet forthwith with the Department of Transportation. Lower down there is this statement: "The Home Owners Association has agreed to provide the impetus and leadership to effect these desired changes, but is acting only as the coordinator for a community wide effort."

When the time came for the agreement to be made, these other people were given no opportunity.

I submit to the Court that the Camillus West

Home Owners do not have the right to negotiate away the rights of others. If there are other people who had a right to a hearing, and when I say hearing I mean a meaningful hearing, if they had that right four months ago, I think they have it this month, I think they have it next month.

If there are procedures that should have been followed four months ago, they should be still followed.

The position taken by Mr. Schecter is a novel one. A few months ago he came into Court and asked for certain relief. Now he has come back into Court and is asking the Judge to reverse his own decision.

I do not think -- or rather it seems to me that the law is not something that can be turned on and off like a water tap, that you can turn it on when you want it, you can turn it off when you don't want it.

I think a position=such as that lends itself to abuse and that the law such as this can be used as a lever for the securing of private interests.

I think that concludes what I would have to say about the law. I will add one other thing. The merchants of the village of Camillus were concerned very largely with the bridge. That stipulation as I read it, I am not sure about it, but I would say there is the widest skepticism among the merchants that they

will see a bridge.

As I understand the procedure the road is to be built and at some time in the future the road will be torn up and then a bridge will be built after the road has been torn up.

It seems rather a unique thing to happen.

Before coming to this hearing I read the decision of this Court in the Oneonta bypass case and I was struck by one paragraph which said that where the determination of certain issues probed in depth, such as is accorded by a trial is in order --

THE COURT: Let me just straighten you out here, this case was determined after a trial.

MR. SAXE: Yes.

THE COURT: That is, a trial on stipulated facts.

MR. SAXE: Yes.

THE COURT: This is a final judgment. In that sense it is different in its legal posture than the case that you referred to. Now maybe it is a distinction that I would expect the layman, or I would expect to elude the observation of a layman, because it is a fine distinction but there is that distinction. That case was heard after a trial and the determination was made after an exploration of the facts, there not being any disputed facts the parties agreed to them, and the judgment was entered on

those agreed facts.

MR. SAXE: I would say just briefly, sir, that I think that if a trial were to be held upon the proceedings of this past six weeks it would be found that the decision of the home owners took place amid an atmosphere of confusion, haste, and crisis.

The meeting was called on 60 hours notice. The members were handed the stipulation during the middle of the meeting, about one and a half hours before they voted. They had no attorney there.

THE COURT: Well, I think I grasp your point. I think that the point you are making is that the discussions that resulted in the stipulation upon which this application is based were not the kind of discussions that you feel were contemplated by the act?

MR. SAXE: Yes, sir, that's correct.

THE COURT: All right, I see the point you are making.

MR. SAXE: I have only one more short sentence to say. You might ask why I am here, and I think these proceedings might leave a someone bitter taste for years to come and I want it on the record that I did speak up.

I have some reason to believe that there are other members who also feel disturbed. We have been told that we should not concern ourselves with matters

of law, that we should leave these up to the Court. I am sure that the Court will decide. I am not so sure that other people do not have some responsibilities also.

Your Honor, that is all I have to say.

THE COURT: I don't know, you may be alluding to a response that I made to someone that wrote me a letter, and I don't have the correspondence in front of me, but I think I undoubtedly recommended that they get counsel, and I would recommend that without exception in any matter of litigation, regardless of the intelligence or scale of any layman, because litigation is a matter in which trained people are advocating positions, and I think it is better, the positions are better presented by people trained in that field than they are by persons not trained, so that if you are alluding to that, the onus is on me, I have recommended it and I continue to recommend it.

MR. SAXE: I realize that full well, Your Honor, it is difficult to get an attorney on short notice.

THE COURT: And I want to commend you on having made a very excellent presentation which clearly points out to me the points you make.

MR. SAXE: Thank you.

THE COURT: All right.

MR. GATES: Your Honor, may I say a word?

THE COURT: Well, of course, that is the purpose -- I am getting into a town meeting. I don't like to cut anybody off, but this is a Court room and not a town meeting. I will hear you, Mr. Gates, I know that you have some interest in this as town attorney, is that right?

MR. GATES: Yes, sir, I do.

My name is John F. Gates. I am attorney for the town of Camillus. The Supervisor is here, the Councilman from the First Ward in which the homeowners Association is located is here. They have asked me to say just very briefly that the town generally is most interested in seeing that this highway is built and urge Your Honor if at all possible within the framework of the law to approve this stipulation so that the work can proceed for the benefit of the entire town.

Thank you, Your Honor.

THE COURT: All right. Now have I heard everyone?

MR. KING: I could make one statement addressed to Mr. Saxe as an intervenor and -- or what have you.

THE COURT: Yes?

MR. KING: I do it with full understanding that it is difficult to make a response to a non-attorney, and I do it because I would like to point out one factor for consideration. That is, that I heard basically, I

attended the homeowners meeting and heard basically the same speech made there by Mr. Saxe. He is a member, from my understanding, and voted in those sessions and now apparently is coming in representing himself as an individual. So he has cast his vote in accordance with the Association on one hand and is now in individually on the other. I merely point that out because I think Mr. Saxe and his Association is represented in these proceedings, and I think that should be noted.

THE COURT: I think that Mr. Saxe would be well advised if he feels that he is not adequately represented by the Association to intervene in his own right or to make an application to intervene. However, up to this point I can see where he would feel that he was well represented. His association prevailed. You don't --

MR. KING: My only point was he has participated since that time essentially in all the settlement discussions in which the attorney for the Association has been present. He has known about this hearing date probably before most of the other people here.

THE COURT: Well, some people apparently knew of it before I did, because my office received telephone calls and I hadn't even heard of it. Fortunately or unfortunately, as it might be, I get the Auburn edition

of the Post Standard, and this Syracuse News is omitted in most instances, and so I don't pick up this local gossip, if that is what it is.

Gentlemen, I think that the matter is a simple matter. Ordinarily when the parties have agreed, regardless of the state of the litigation, I am inclined to say, "Well, you have done a better job than any Court could do, you have come to an agreement and you have resolved your differences." But I think that the differences that have been resolved here are not the differences that brought the people to Court and are not the differences that the Court was asked to adjudicate.

This action was started, at least I thought, not for the purpose of getting a bridge or a turn in the road someplace else or an underpass someplace else, because the Court doesn't have the authority to order those things. I thought the action was brought to compel compliance with certain Acts of Congress, Acts of Congress which proclaim policies in relation to environmental, social and economic policies which only Congress can declare.

I thought the action was brought, and I think it was to flesh out and give force and effect to Congressional enactments that require notices and hearings to the general public so that the people that make the decisions would have the benefit of that discussion. Not only the benefit

of it, but the obligation to consider it.

With reference to the social, economic and environmental considerations, the policy the -- the policy of the law as I understand it was to make sure not that the doers, the builders of roads, the doers and builders of government projects, completed those projects in one way or another, but that they gave consideration, studied, studied consideration to those factors and that they submitted in the making of that kind of a statement to indicate that they gave such consideration, they submitted to various governmental agencies having an interest in various phases of the effect of policies touching those areas on the welfare of the country.

In other words, the plaintiff in an action such as this occupies more or less the position of a private attorney general, and it was with that kind of an understanding that I entered the judgment that I did.

Now I think that the cases generally that support that view, and of course the arguments are made constantly, that Overland Park case, which all the counsel are -- which all the counsel I am sure are familiar with, initially or finally reached a conclusion I think with the road terminating at one end of the park and commencing at the other and no joinder, for reasons somewhat -- I won't say somewhat, I will say not too

different than what you are asking be done here. That is, failure to consider the provisions of the National Environmental Policy Act. I suppose it hardly recommends itself as being sound in any respect. I think one Court said it rather well when speaking of the effects of the delay of construction as a ground for not granting injunction initially, of course that is always something that is presented for the Court's consideration. Now this case was passed on before, the judgment was entered, I think my decision points out that there was no evidence that this case -- because only the bypass was referred to as distinguished from the Oneonta bypass where I listed the injunction as to two small segments. That particular portion of the road that was represented to me, and I believe it is a fact, to have been somewhat over 90% completed, nothing but a little, you might say cosmetic work left to be done so that the road would be usable, under those circumstances the equity appealed to me and I permitted that portion of I-88 to proceed. Of course in that case I also as in this one only restrained the advance of Federal funds, I made no attempt to control what the state does on its own. If it doesn't want to join in the Federal program I don't think that is my -- when I say my, I don't think that is the District Court's business, but if they want this benefit of the Federal

program, Congress has mandated certain compliance with certain acts and I think it is fair that they be required to respond to it.

Now in that case, or in this case rather, counsel for the Government rather feebly, I have to admit, took a position contrary to the position that I took, but I don't think they were very serious about it because they filed a notice of appeal and withdrew the notice of appeal which was before this case was argued and which was -- this motion was argued -- and I think of necessity, because I probably would have been foreclosed from hearing the motion pending the appeal.

But to get back to what I started to say, one of the Courts I think expressed the thing very well when it talked about going ahead with it as is suggested here, go ahead with the road and then hold the hearings and prepare the impact statement. The Court in that instance said: "This Court declines to accord much weight to these factors because whatever validity they might have rests on a totally erroneous conception of one of NEPA's essential purposes. NEPA is designed to assure not merely that a major Federal Action will be taken with minimum damage to the environment, it also requires an agency decision informed as to all pertinent environmental factors as to whether or not a major Federal action

should be undertaken at all." And of course here we are undertaking the action, asking that the statements and hearings be held afterwards.

Not that quote I just read is from Committee to Stop Route 7 against Volpe, 346 Fed. Supp. 731 at page 738.

I think another quote that is pertinent here is this statement from Arlington Coalition on transportation against Volpe, 458 Fed. 2d, 1323 at page 1332: "Finally, the district Court held and appellees claim that the question whether Section 102(C) --" that is the section of the Environmental Policy Act -- "must be complied with is moot because the Secretary has agreed voluntarily to file an Environmental impact statement. We disagree. Filing a report without suspension on work on Arlington I-66 until the report has been considered by the Secretary is not the sort of compliance that is likely to change the result." Referring to the same section the statement goes on, and I am now quoting "It contemplates that only that a report be compiled but also that the Secretary take into account the information contained therein in determining the final location and design of a highway.

This statute does not limit the authority of any governmental agency in any permanent or conclusive manner.

It does, however, contain a mandate that action can be

taken only following complete awareness on the part of the actor of the environment consequences of his action and following his having taken the steps required by the Act."

I think that pretty much sums up the situation here. I think what I am being asked to do is to render policy that has been enunciated by Congress as a policy of our Government, I am asked to render it negatory, and I don't intend to do it.

Now there have been instances where these acts should not be applied to a particular nullity. Of course the Congress set the policy and they are free to act in relation to it, but I don't think that the Court is. I think that it seems to me like almost affording a man to be -- a man condemned to be executed a trial after his execution, it is of small effect and little value.

The motion is denied. I will enter an order.

Now do you want to be heard on your intervention?

MR. KING: Perhaps we could merely submit. You have all of our paper work.

THE COURT: All right, if it is submitted I have considered it. I will deny it without prejudice to renewal as such time as there is further action in the case.

Now my decree here I believe was to restrain

pending compliance with these Acts. If there is any question about compliance, of course your proposed intervenors or any other proposed intervenors will be heard.

The motion is denied with prejudice. Submit an order.

ORDER APPEALED FROM.

(SAME TITLE).

On July 22, 1974 the court having heard the attorneys for all the parties and other interested persons upon the return of the attached order to show cause, and having dictated its decision on the record, it is

ORDERED, that the motion to modify the judgment herein dated March 20, 1974 be and the same hereby is denied in all respects.

s/ EDMUND PORT
United States District Judge

Dated: July 23, 1974
Auburn, New York

NOTICE OF APPEAL.

UNITED STATES DISTRICT COURT
for the
NORTHERN DISTRICT OF NEW YORK

CAMILLUS WEST HOMEOWNER'S ASSN INC.,
Individually and on behalf of all those
entitled to the use and enjoyment of the
environment and natural resources of the
Town of Camillus, New York, and all
others similarly situated

Plaintiffs

-against-

CLAUDE E. BRINEGAR, Individually and
as Secretary of Transportation of the
United States and
RAYMOND T. SCHULER, Individually and
as Commissioner of the Department of
Transportation, State of New York

Defendants

CIVIL ACTION NO. 73-CV-481

Notice is hereby given that Raymond T. Schuler,
Individually and as Commissioner of the Department
of Transportation, State of New York, one of the
defendants above named, hereby appeals to the United
States Court of Appeals for the Second Circuit from the
order denying the motion to modify the judgment herein
dated March 20, 1974, which order was entered in this
action on July 24, 1974.

Notice of Appeal.

DATED: August 20, 1974

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BY s/ JOSEPH T. HOPKINS
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Attorney for Defendant Brinegar
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Albany, New York 12201

HON. J.R. SCULLY, Clerk
United States District Court of the
Northern District of New York
Federal Court House
Utica, New York

RECORD INDEX.UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUITNorthern District of New York
Civil No. 73-CV-481-----
CAMILLUS WEST HOMEOWNER'S ASSN., INC., etc.

Plaintiff-Appellee

vs

CLAUDE E. BRINEGAR; RAYMOND T. SCHULER

Defendant-Appellant

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STATE OF NEW YORK)
COUNTY OF ALBANY)
CITY OF ALBANY)

ss.: Camillus West Homeowner's Ass'n, Inc., v.
Claude E. Brinegar, et al.

Christy Plumadore

, being duly sworn, says:

I am over eighteen years of age and a Stenographer

in the office of the Attorney General of the State of New York, attorney
for the Defendant-Appellant herein.

On the 26th day of November 1974 I served

the annexed Joint Appendix & Brief For Defendant-Appellant upon the
person & two copies of the Joint Appendix
attorneys named below, by depositing three copies thereof,
of our brief

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Sworn to before me this

26th day of November 1974

Christy Plumadore

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Qualified in Tompkins County
Term Expires March 30, 1976